Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

BERNARD J. DOLENZ,

Petitioner,

v.

SOUTHWEST MEDIA CORPORATION
and GLENNA WHITLEY.

On Petition For Writ Of Certiorari To The Texas Supreme Court And Fifth Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE

DID THE COURT OF APPEALS ERR IN RULING THAT PETITIONER IS A LIMITED PURPOSE PUBLIC FIGURE FOR THE SUBJECT MATTER OF THE ART OF THE CON IN VIOLATION OF THE U.S. CONST. FIRST AMEND, TEX. CONST. ART I, § 8?

QUESTION TWO

DID THE COURT OF APPEALS ERR IN RULING THAT THE ART OF THE CON AS A WHOLE AND THE SPECIFIC STATEMENTS THEREIN, IS AND ARE, RESPECTIVELY, ENTITLED TO BE PROTECTED BY THE FOLLOWING PRIVILEGES AS A MATTER OF LAW: (1) "FAIR, TRUE, AND IMPARTIAL ACCOUNT[S] OF A JUDICIAL PROCEEDING[S]", PURSUANT TO TEX. CIV. PRAC. & REM. CODE §73.002(b)(1)(A); AND (2) A "REASONABLE AND FAIR COMMENT ON OR CRITICISM OF AN OFFICIAL ACT OF A PUBLIC OFFICIAL OR OTHER MATTER OF PUBLIC CONCERN PUBLISHED FOR GENERAL INFORMATION". TEX. CIV. PRAC. & REM. CODE §73.002(b)(2)?

QUESTION THREE

DID THE TRIAL COURT ERR IN RULING THAT THE ARTICLE AS A WHOLE IS A REASONABLE AND FAIR COMMENT ON A MATTER OF PUBLIC CONCERN PUBLISHED FOR GENERAL INFORMATION?

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QUESTION FOUR

DID THE TRIAL COURT ERR IN RULING THAT THE ART OF THE CON IS A PROTECTED STATEMENT OF OPINION WHICH DOES NOT IMPLY FALSE AND DEFAMATORY FACTS AND IS THEREFORE NOT LIBELOUS?

QUESTION FIVE

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QUESTION SIX

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QUESTION SEVEN

DID THE TRIAL COURT ERR IN RULING THAT THE ART OF THE CON IS SHIELDED BY THE "NEUTRAL REPORTAGE" PRIVILEGE?

QUESTION EIGHT

DID THE COURT OF APPEALS ERR IN RULING THAT NO MATERIAL ISSUE OF FACT EXISTED AS TO WHETHER OR NOT THE DEFENDANTS SUBJECTIVELY DRAFTED/PUBLISHED THE ART OF THE CON WITH ACTUAL MALICE?

LIST OF PARTIES

PETITIONER: Bernard J. Dolenz, M.D. Appellant is an attorney representing himself.

RESPONDENTS: Southwest Media Corporation and Glenna Whitley.

RESPONDENTS' ATTORNEYS: Donald C. Templin, Stacey E. Sallee, Robert C. Jenevein, Haynes & Boone, L.L.P., 3100 NationsBank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

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The Defendants were granted Final Judgment on November 24, 1993 Judgment and Opinions were filed December 30, 1994 affirming the trial court's judgment in the Dallas Court of Appeals, which also overruled the Motion for Rehearing February 15, 1995. The Texas Supreme Court denied the application for Writ of Error October 19, 1995, and overruled the motion for rehearing November 22, 1995. The above decrees are sought to be reviewed and are in the appendix.

JURISDICTION

This Court has jurisdiction pursuant to 28 USCA Section 1254. The Petitioner seeks to set aside the Final Judgment and Opinion and Judgment of the Court of Appeals, as these courts have attempted to decide an important question of federal law regarding defamation which should be settled by this Court as the decision of these state courts conflict with applicable decisions of this Court such as *Gertz, Cianci,* and *Hutchinson.*

Case law concerning the First Amendment involving defamation was first brought in the Trial Court in:

(a) Response in Opposition to Plaintiff's Motion to Compel and Defendant's Motion for Protective Order; (b) Defendant's Objection and Response for Production of Documents; (c) Response to Amended Motion for Summary Judgment.

STATUTES INVOLVED

Amendment 1: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

CIVIL PRACTICE & REMEDIES CODE:
§ 73.002. Privileged Matters

* * *

(b) This section applies to:

(1) A fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;

(B) an official proceeding, other than a judicial proceeding, to administer the law;

* * *

(2) Reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

STATEMENT OF FACTS

This libel action was brought by Bernard J. Dolenz, M.D., Esq., ("Petitioner" or "Dolenz") regarding an article published about him in the April, 1992, issue of *D Magazine* entitled **"THE ART of THE CON"**.[1] As the title of the article and its front cover, Exhibit A make clear, the attorney accused and implicitly indicted for being a "con man" in relation to his dealings with his own client, is the Petitioner.

The trial court granted the Respondents' Amended Motion for Summary Judgment "in all things". (Tr. 246 & App. 1).

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[1] Not only is the original in **bold** and **CAPITALIZED**, but the original has blown up these words to fill nearly half of an 8½' x 11' page.

SUMMARY OF ARGUMENT

The "Art of the Con" article published by the Defendants trashed Dr. Dolenz's reputation and reasonable inferences are given in the record to show that it was drafted and/or published with actual malice. Dr. Dolenz is a private person.

ARGUMENT

QUESTION ONE: THE COURT OF APPEALS ERRED IN RULING THAT PETITIONER IS A LIMITED PURPOSE PUBLIC FIGURE FOR THE SUBJECT MATTER OF THE ART OF THE CON.

> In footnote one (1) the Dallas Court of Appeals states: "that Dolenz is a [sic] limited-purposed public figure . . . "

Dolenz is *not* a "limited purpose public figure for the subject mater of the" Art of the Con. The controlling case in determining whether the Petitioner is a limited purpose public figure, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 79, 94 S.Ct. 2997 (1974), establishes that he is not.

With all due and sincere respect to the Honorable Dallas Court of Appeals its two paragraph "APPLICATION OF LAW TO FACTS" section, in the concurring and alternatively adopted opinion of the Honorable James A. Baker, his Honor summarily concludes that the Appellant below is a limited purpose public figure, however, his Honor does not take heed or recognize any of the below-cited and analyzed controlling opinions of the United States Supreme Court or of any of the far more factually analogous Texas opinions than *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth, 1982, writ ref'd n.r.e.). In *A.H. Belo* the Court specifically found that Rayzor who was a trustee of a public institution, specifically the Board of Development for NTSU, had "thrust himself into the vortex of the public issue involving North Texas State University and engaged the public's

attention in an attempt to influence its outcome." *Id.* at 84.

Unlike the *A.H. Belo* case and the instant case, there are a number of factual similarities between the *Gertz* case and the instant case. Gertz, an attorney, like Petitioner, was involved in the representation of a client whose claims and case could reasonably have been foreseen to lead to significant media exposure. Gertz represented a family whose boy was shot by a Chicago policeman in a civil action to recover damages against the officer. Dolenz represented a formerly well-known painter with an action against the biggest bank in Dallas, then, NCNB, Texas. The title of the libelous article in the *Gertz* case was "FRAMED-UP: Richard Nuccio and the War On Police."[2] Here, **"THE ART of THE CON"**.[3]

The Supreme Court ruled that Gertz was not a public figure despite its acknowledgment that

> Gertz "has long been active in community and professional affairs." *Gertz*, 418 U.S. at 351, 94 S.Ct. at 812.

The Appellees below failed to bring forth summary judgment evidence which places Dolenz' notoriety in the community anywhere close to that of Mr. Gertz. However, even if they had brought forth evidence establishing that Petitioner has been active in local civic organizations

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[2] The United States Supreme Court said the following about the article in the *Gertz* case: It "purports to demonstrate that the testimony against [the criminal defendant] was false and that his prosecution was part of the Communist campaign against the police. . . . The [magazine] portrayed [Gertz] as an architect of the 'frame-up.' "

[3] The ART of the Con clearly purports to demonstrate that the Appellant is a con man whose main objective in his attorney/client relationship with Dmitri Vail was to defraud his client and portrays him as a ruthless individual who prays on elderly individuals who are unaided by legal counsel through trickery, deceit and fraud.

for over three decades, which they did not, he, like Gertz, has "achieved no general fame or notoriety in the community." *Id.* at 418 U.S. 351-2, 94 S.Ct. at 812.

The standard by which the determination must be made as to whether the Petitioner is a limited purpose public figure is as follows:

> [h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain the status have assumed rules of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. *Id.* at 418 U.S. at 345, 94 S.Ct. at 808.

The alleged and sole summary judgment evidence which the Respondents brought to bear in the trial court on this issue was one *D Magazine* article which was *not* solicited by Dolenz. Over two years prior to the publication of the The Art of the Con, a writer for *D Magazine* contacted Petitioner and based on this contact published a story which dealt solely with the topic of Dmitri Vail's lawsuit, wherein he was represented by Petitioner, against NCNB, Texas. (Tr. 105-107) Petitioner's summary judgment evidence clearly states that he did not seek this publicity. (Tr. 129)

The Respondents' never adduced any evidence that Petitioner in any way engaged the public's attention regarding the *drastically different* topics of *Lievrouw v. Vail v. Dolenz* or *State Bar of Texas v. Dolenz.*

The Respondents, in fact, cited the *Gertz* case (Brief in Support of Motion for Summary Judgment, p. 15) and concede that "[t]he most important factor in determining whether one is a public figure is whether he has sought publicity *on the topic* being discussed." (emphasis added) Even if Dolenz did seek this publicity, which the Petitioner's summary judgment evidence clearly contradicts (Tr. 129); Petitioner did not seek any publicity or invite any attention or comment regarding his daughter's suit against Dmitri Vail and Dolenz did not seek any publicity or invite any attention or comment regarding the State Bar suit against him. Therefore, Dolenz could not possibly be a public figure regarding *these topics*. None of the defamatory statements set forth in Plaintiff's First Amended Original Petition below relate to the *topic* of *Vail v. NCNB*. This case is the *sole topic* upon which the Respondent's allege, albeit incorrectly, that Dolenz sought publicity.

Dolenz, like Gertz, "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. at 352, 94 S.Ct. at 812. Defendants below presented absolutely no summary judgment evidence, and in fact, did not even argue that Dolenz engaged the public's attention in relation to anything to do with the topics of *Lievrouw v. Vail v. Dolenz* or *State Bar of Texas v. Dolenz*. Despite this paramount concession by the Appellees below and the joining of issue between the Appellants and the Appellees in the Dallas Court of Appeals, they failed to even address this result oriented issue.

Further support for the proposition that Petitioner is not a public figure or even a limited purpose public figure is found in the Texas Supreme Court's interpretation of the binding and mandatory authority of the *Gertz* case in the case of *Foster v. Laredo Newspapers, Inc.*, 541

S.W.2d 809 (Tex. 1976), *cert. denied*, 97 S.Ct. 1160, 429 U.S. 1123, 51 L.Ed.2d 573 (1976).[4]

Relying heavily on analysis of the *Gertz* case and on the similarities between Mr. Gertz and Mr. Foster, in terms of the fact that neither of them had "achieved pervasive fame or notoriety in the community", the Texas Supreme Court held "that the summary judgment evidence failed to establish that Foster achieved the status of public figure within the context of the public controversy over the flooding in that community. *Id.* at 817.

The defamation plaintiff in *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845 (Tex. Civ. App. – Amarillo 1982, writ dism'd w.o.j.) also an attorney, brought an action against a broadcasting station which had claimed after "two weeks of personal investigation . . . that [Durham] was connected with a club . . . which was used as a front for various activities including orgies and prostitution", which was called the Chicken Ranch. *Id.* at 847. While the *Durham* Court stated that Durham might be considered a limited public figure for purposes of public controversies involving Potter County mismanagement, "the broadcast in question concerns appellant's alleged involvement with the Chicken Ranch. This was a controversy apart from the public controversies in which [Durham] had thrust himself to the forefront." *Id.* at 851. Given that the alleged defamatory statements concerning the Chicken Ranch had nothing to do with Durham's public activities, and there was no summary judgment evidence claiming there was any connection, the Court reversed the holding that Durham was a limited purpose public figure.

In *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S.Ct. 1668, 118 L.Ed.2d 388, Gerry Spence had

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[4] Accord, *Poe v. San Antonio Exp. -News Corp.*, 590 S.W.2d 537, 40-41 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.) ("[t]here is nothing in the summary judgment proof to establish that Poe is a 'public figure' as that term is used in libel suits.")

undertaken to represent an antipornography advocate in her litigation against Hustler magazine, and because of his representation was attacked in this magazine's July 1985 issue, being called several nasty copralalic names. The summary judgment granted in favor of Hustler and its owner, holding that the Hustler article constituted protected defamatory criticism of a public figure, was reversed with the Wyoming Supreme Court ruling:

A professional person, who may be a "public figure" for some purposes, should be free to offer his services to a client as a private professional without being subjected to public figure defamation. To hold otherwise would have a chilling effect upon attorneys who undertake to represent clients in difficult, unpopular, high profile, or sensational types of cases. We can foresee also detriment to these potential clients being unable to employ skilled, capable, specialist lawyers who have achieved some fame and reputation because of their legal and trial abilities and are claimed to have achieved public figure status. Under these circumstances, we hold that a person situated, as Spence is here, is not subject to defamation without recourse. We see no threat to the principles of the First Amendment which we, as a court of last resort, have upheld with great vigor; but there must, as the United States Supreme Court has itself held, be some balance between Freedom of Speech and Press and other interests of constitutional proportions which are of equal importance. Free speech cannot equate with the freedom to intimidate, destroy and defame an advocate seeking to represent a client.

* * *

On remand, the parties will have ample opportunity to establish whether Spence is a public or private figure. Thus, our holding is that a lawyer who is merely advocating for a famous or controversial client is not a public figure merely because he has taken on the cause as advocate. We hold that there is not a special opinion privilege,

and, under the circumstances of this case and the principles enunciated in *Gertz*, 418 U.S. 323, 94 S.Ct. 2997, and *Milkovich*, ___ U.S. ___, 110 S.Ct. 2695, Spence may have his day in court.

As there is no summary judgment evidence or allegations that Dolenz attempted to influence the outcome, in a public forum, of (1) his daughter's suit against Vail; (2) the State Bar suit against him; (3) his suit against All Saints Hospital; or (4) Caroline Berthelot's suit against Virginia Brinkmann, the Court of Appeals ruling, that he was a limited purpose public figure in relation to these topics and all others, including *Vail v. NCNB*, must be reversed.

QUESTION TWO: THE COURT OF APPEALS ERRED IN RULING THAT THE ART OF THE CON AS A WHOLE AND THE SPECIFIC STATEMENTS THEREIN, IS AND ARE, RESPECTIVELY, ENTITLED TO BE PROTECTED BY THE FOLLOWING PRIVILEGES AS A MATTER OF LAW: (1) "FAIR, TRUE, AND IMPARTIAL ACCOUNT[S] OF A JUDICIAL PROCEEDING", PURSUANT TO TEX. CIV. PRAC. & REM. CODE §73.002(b)(1)(A); AND (2) A "REASONABLE AND FAIR COMMENT ON OR CRITICISM OF AN OFFICIAL ACT OF A PUBLIC OFFICIAL OR OTHER MATTER OF PUBLIC CONCERN PUBLISHED FOR GENERAL INFORMATION". TEX. CIV. PRAC. & REM. CODE §73.002(b)(2).

The privilege granted to publishers under Section 73.002 of the Texas Civil Practice and Remedies Code (hereinafter "Section 73.002") is a qualified privilege. *Golden Bear v. Chase*, 708 F.2d 944, 949 (5th Cir. 1983). Thus, "[a] report which is not a fair, true *and* impartial *or* which is actuated by malice, does not enjoy this privilege." *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970) (emphasis added). Moreover, this qualified privilege is an affirmative defense, and "the defendant has the burden of proving that the publication is privileged." *Id.* "Having failed to establish that [Dolenz] was a

public official as a matter of law, defendants' burden of establishing that the publication was privileged [pursuant to what is now Section 73.002] is considerably more onerous. Under these circumstances it was not incumbent upon plaintiff to prove malice or negate the matter of privilege. To the contrary, it was defendant's burden to establish the privilege relied on by it as a matter of law." *Poe v. San Antonio Exp. -News Corp.*, 590 S.W.2d 537, 40-41 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.) The Dallas Court of Appeals fails to recognize this authority.

Moreover, the Dallas Court of Appeals has drastically misstated this court's standard as to when the question of privilege under Section 73.002 is a question of law. The Dallas Court of Appeals has stated this test in the disjunctive: "when the language used is unambiguous ***or*** when the facts and circumstances surrounding the defamation are undisputed." *Bernard J. Dolenz, M.D. v. Southwest Media Corporation & Glenna Whitley*, No. 05-94-00091-CV, slip op. at 6 (Tex. App. – Dallas, December 30, 1994, writ requested) This is not the controlling Texas Supreme Court standard.

The actual test is stated by the Texas Supreme Court in the conjunctive, to wit; when "the facts are undisputed ***and*** the language used in the publication is not ambiguous, [is] the question of privilege . . . one of law. . . . " *Denton*, 460 S.W.2d at 884; *Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Tex. 1969); *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 228 S.W.2d 499, 505 (Tex. 1950); *Walker v. Globe-News Pub. Co.*, 395 S.W.2d 686 (Tex. Civ. App. – Amarillo 1965, writ ref'd n.r.e.); *Root v. Republic National Bank of Dallas*, 337 S.W.2d 709 (Tex. Civ. App. – Dallas 1960, no writ) (emphasis added). "[U]nder Texas law, the jury must resolve whether articles containing [ ] ambiguous statements are 'substantially true.' " *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 669 (5th Cir. 1984), accord, *Denton Publishing Co. v. Boyd*, 460 S.W.2d at 884 ('[i]f the language used in the publication is ambiguous,

the jury must determine how it would have been interpreted by the ordinary reader.")

The Dallas Court of Appeals principally relies on *Rogers v. The Dallas Morning News*, No. 05-93-00689-CV, slip op. at 5 (Tex. App. – Dallas, September 30, 1994, no writ) in affirming the summary judgment. In *Rogers* the Dallas Court of Appeals applied this Court's standard announced in *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990) in affirming a summary judgment based upon twelve (12) articles published in the Morning News relating to reporting on a philanthropist's financial aptitude and efficiency, or relative lack of one or both, in her dealings with entitles aiding in the lending of financial assistance to finance the surgeries of adolescents in need of craniofacial surgery.

Unlike in the *Rogers* case where the Dallas Court of Appeals "conclude[d] that the underlying fact as to the gist of the articles are undisputed", slip op. p. 14, in the instant case not only was no such finding made, it could not possibly be made. The most striking and representative examples of unconscionable craters between what was reported and the truth are listed herein. Because the underlying facts are hotly disputed on matters of primary importance, the Dallas Court of Appeals can not possibly move to the *second* leg of the *McIlvain* standard and "disregard[ ] any variances with respect to items of secondary importance". *Rogers*, slip op. at 14.

The privilege under Section 73.002(b)(2) extends only to "fair criticism." *Golden Bear v. Chase*, 708 F.2d at 949. All statements of fact are not protected by the qualified privilege and are potentially actionable in libel. *Bell Publishing Co. v. Garrett Engineering Co.*, 141 Tex. 51, 170 S.W.2d 197, 204-05 (Comm'n App. 1943, judgment adopted). While substantial truth may be a defense to a libel action under Section 73.002, *Crites v. Mullins*, 697 S.W.2d 715 (Tex. App. – Corpus Christi 1985, writ ref'd n.r.e.), where greater opprobrium would attach to a libel

plaintiff's actions because of such exaggerations that conditional privilege does not apply. *Id.* at 717.

"The critical test is the effect of the mind of the reader or listener"; if there would be a variance in that person's mind based upon the actions charged and the actions proved, there is no such conditional privilege. *Id.* Thus, the degree of false reporting can require reversal. *Express Publishing Co. v. Gonzales,* 350 S.W.2d 589 (Tex. Civ. App. – Eastland 1961, writ ref'd n.r.e.). Hence, omissions of fact clearly defeat a defendant's ability to carry its burden in establishing this qualified privilege. As the court in *Crites* stated in analyzing the *Express Publishing Company* ruling:

> [t]hus, even though isolated sentences were literally true, the article as a whole left an entirely untrue impression by omitting relevant facts which would plainly refute the false impression of the partial statement.

Id. at 717.

Hence, even though it was "substantially true" that libel plaintiff Boyd was bankrupt as it was announced at a city council meeting that he was "bankrupt", due to the fact that he had not actually "declared bankruptcy", this Court, in the absence of any evidence that malice existed, held that the newspaper failed to prove the existence of the conditional privilege accorded to reporting a "fair, true and impartial account of the proceedings." *Denton Publishing Company v. Boyd,* 460 S.W.2d 881 (Tex. 1970). Moreover, this Court has declared that to state someone is a bandit involved in an armed robbery, even when the libel plaintiff was arrested in relation to the armed robbery "is not a privileged communication with the meaning of [the predecessor to §73.002(b)(1)(A) or (b)(2)]." *Christy v. Stauffer,* 814 S.W.2d at 815-16.

It is beyond legitimate debate that the Art of the Con is capable of defamatory meaning in the eyes of the ordinary reader. Attorneys owe their clients fiduciary obligations. A fiduciary responsibility is the highest that

the law imposes. The reputation of an attorney is paramount to the respect that he must have before the court, juries, as well as potential clients. Destroying the reputation of an attorney by either a direct or implied charge of fraudulent conduct with a client strips him of his most important professional and financial commodity. The easiest way to do this is to claim that he is dishonest in his dealings with his own clients.

Not only did the Art of the Con allege that Petitioner was dishonest in his dealings with his own clients, but the Article "as a whole" implicitly alleges that it was his scheme, design and premeditated plan to take his client for all he was worth. The law attaches a presumption of fraud in subsequent contracts between attorneys and clients. *O'Bryne v. Oak Park Trust & Savings Bank*, 450 S.W.2d 411, 418 (Tex. Civ. App. – Beaumont 1970, writ ref'd n.r.e.). However, the law regarding libel prohibits the damaging of a professional reputation of a private individual when an article taken as a whole, is so obviously capable of defamatory meaning.

Interestingly, counsel for the Respondents, Donald C. Templin, Esq., made no mention in the court below of a case directly on point that he represented the publisher before the United States Court of Appeals for the Fifth Circuit. *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 669 (5th Cir. 1985). Interpreting this Court's standard, the *Levine* Court ruled that the identical predecessor to Section 73.002 did not apply because "[a] jury could reasonably find that the sentence, '[a]nd [affiant] accused [libel plaintiff] of outright theft' was not a substantially accurate account of the proceedings." *Id.* at 668. The proceeding was a civil suit by a company founded by the libel plaintiff alleging that he had stolen computer tapes in violation of a consent judgment wherein he agreed to return them. *Id.* at 663. The statement was based on an affidavit which responded to a claim made by the libel plaintiff that copies of the tapes were "floating around." The affidavit stated this claim was "erroneous", that there

were "stringent controls" on access and "[i]f there are any tapes it came about through outright theft." *Id.* at 665-66.

Certainly, the variance between the proceeding and the publication in *Levine* is a much closer accounting of a judicial proceeding than claiming that Dr. Dolenz actually "began to threaten" (Tr. 80) a head nurse at a hospital in which he was associated. The deposition exhibit upon which the publisher allegedly relied in making this statement of actual conduct was a letter which claimed that "it has been expressed that" Dr. Dolenz has *"displayed a manner* which is abusive and threatening." (Tr. 80) Affirmatively stating that Petitioner, a medical doctor and an attorney, actually threatened a head nurse (Tr. 161), certainly entitled the Petitioner to allow the jury to determine if this was a substantially accurate account of a judicial proceeding.

The trial court's holding that these facts are undisputed and the Court of Appeals holding that and therefore the application of the privilege is a question of law is not only patently incorrect but is clearly violative of this Court's rulings in *Denton* and *Christy* and the Fifth Circuit's ruling in *Levine.*

A statement in the Art of the Con[5] is not only a colossal variance from an accurate account of a judicial proceeding, it is not a "fair", not a "true" and not an "impartial account" of a judicial proceeding. Accordingly, the Court of Appeals must be reversed and this case must be remanded to the trial court.

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[5] "Vail, when he was without a lawyer, was found in contempt of court and fined $500 for filing an affidavit that wasn't properly notarized."

QUESTION THREE: THE TRIAL COURT ERRED IN RULING THAT THE ART OF THE CON AS A WHOLE IS A REASONABLE AND FAIR COMMENT ON A MATTER OF PUBLIC CONCERN PUBLISHED FOR GENERAL INFORMATION AND IS THEREFORE PRIVILEGED UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE TEXAS CONSTITUTION.

The controlling authority establishes that the Art of the Con is not a reasonable and fair comment on a matter of public concern published for general information privileged under either the United States or Texas Constitution.

First off, the Art of the Con does not address a matter of public concern. Defendants below heavy reliance on the case of *Wavell v. Caller Times Pub. Co.*, 809 S.W.2d 633 (Tex. App. – Corpus Christi 1991, writ denied), citing it eight (8) times in their Brief in Support of Motion for Summary Judgment, is misplaced. The basis for the affirmation of the summary judgment in *Wavell* is the holding that the matters in that case were of "legitimate public concern." *Id.* at 636. In making this holding, the Corpus Christi Court of Appeals acknowledged the mandatory authority of the United States Supreme Court on this issue as stated in the case of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d at 328 (1975). It is this mandatory authority upon which the obvious distinction between the *Wavell* case and the instant case arises. The *Wavell* Court stated:

> In *Cox Broadcasting*, the Supreme Court held that crimes, prosecutions, and judicial proceedings associated with them "are without question" events of legitimate public concern.

Id. at 636.

Respondents have never argued, and could not possibly argue, that any of the judicial proceedings, which they were obligated to give "fair, true, and impartial accounts of", are in any way related to a crime or a

prosecution, for none exist relating to the judicial proceedings in question. Dolenz, unlike the libel plaintiff attorney in the *Wavell* case was not a victim of a crime. Furthermore, none of the individuals mentioned in the Art of the Con were criminal defendants or expressly accused of a crime. On the contrary, the former concubine of the libel plaintiff in the *Wavell* case was indicted in relation to an assault on attorney Wavell. *Id.* at 634.

Not only are the matters addressed in the Art of the Con not of a legitimate public concern, moreover, they are not entitled to a "reasonable and fair comment" privilege. The Art of the Con unquestionably contains the imputation of fact that Dolenz attempted to take advantage of, bilk and defraud his own client. "Whatever may be the mode of expression used, if an assertion of guilt is implied or intended, the words will be actionable" and the privilege of fair comment will not apply. *Cianci v. New York Times Publishing, Co.*, 639 F.2d 54, 66 (2nd Cir. 1980), cert denied, 386 U.S. 1010 (1980) (additional citation omitted).

Further, "the common law privilege of fair comment does not here apply because the disclosed facts and any implied opinion are inextricably intertwined in the accused article. The reader is not presented with facts and a separate inference therefrom; rather, the opinion is conveyed as part and parcel of the factual disclosures." *Cianci v. New York Times Publishing Co.*, 639 F.2d at 66; citing, *Luster v. Retail Credit Co.*, 575 F.2d 609, 616-17 (8th Cir. 1978) (credit report detailing certain facts could be read as charging the plaintiff with arson and is actionable). "In such a case it is meaningless to say that the opinion is protected, when the facts are not." *Id.*

"[W]hen an 'opinion' is something more than a generally derogatory remark but is laden with factual content, such as charging the commission of serious crimes, the First Amendment confers no absolute immunity." *Cianci v. New York Times Publishing Co.*, 639 F.2d at 63. However, "there is a critical distinction between opinions

which attribute improper motives to a public officer and accusations, in whatever form, that an individual had committed a crime or is personally dishonest." *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 604, 131 Cal. Rptr. 641, 646, 552 P.2d 425 (1976).

Reading the Art of the Con in the light most favorable to the Respondents, it not only accuses Dolenz of being personally dishonest but accuses him of conduct, which for an attorney, is criminally fraudulent (e.g., having his client, Vail, sign documents that are not in his best interest when Vail was not capable of understanding them). Claiming that this accusation is not made by the Art of the Con, as a whole, would be akin to claiming that Dolenz is not accused in the Art of the Con of being a con man in his dealings with Vail.

The common law privilege of a reasonable and fair comment on a matter of public concern does not apply to the Art of the Con.

QUESTION FOUR: THE TRIAL COURT ERRED IN RULING THAT THE ART OF THE CON IS A PROTECTED STATEMENT OF OPINION WHICH DOES NOT IMPLY FALSE AND DEFAMATORY FACTS AND IS THEREFORE NOT LIBELOUS.

The opening salvo in many arguments for protection from defamation actions is "[u]nder the First Amendment, there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, supra, 418 U.S. 323 at 339-40. However, Justice Powell's very next sentence, was that "there is no constitutional value in false statements of fact." *Id.*

The alleged libels in *Gertz*, which were deemed sufficiently "factual" to support an action for defamation, included an "implication that petitioner had a criminal

record" and charges that he was a "Leninist" or a "Communist-fronter". *Id.* at 326, 94 S.Ct. at 3000.[6] The sort of idea which can never be false was illustrated by reference to Thomas Jefferson's inaugural address, where the President argued for freedom for those "who would wish to dissolve this Union or change its republican form." *Id.* at 340 n. 8, 94 S.Ct. at 307 n. 8. The statement that Dolenz got his patient, Dmitri Vail, to execute subsequent contracts which are constructively fraudulent under Texas law, when he was incapable of understanding them clearly falls within the United States Supreme Court's explication of false statements of fact rather than its illustrations of false ideas where public debate is the best solvent.[7]

Even if the Art of the Con were read as only expressing the "opinion" that Dolenz committed fraud by negotiating with a client to his advantage when the client could not understand the contract, such is not protected speech, as the charge of fraud, deceitful and dishonest conduct obviously could be understood to impute "specific criminal [and/] or other wrongful acts." The "principle of the Green Belt – Letter Carriers – Gertz trilogy" protects vigorously expressed statements of opinion, even when such opinions "could refer to criminal conduct if the term could not be reasonably so understood in context; but . . . the principle does not cover a charge which could reasonably be understood as imputing specific

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[6] Appellant additionally incorporates his recitation of additional "nonfactual" allegations in the *Gertz* case also deemed sufficiently factual by the Supreme Court to support a libel claim on page 4 and in footnotes 2 and 3.

[7] The other Supreme Court cases usually cited as creating a constitutional exception for statements of opinion, *Green Belt Cooperative Publishing Ass'n. v. Brsler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), and *Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974), also provide no further support for the Appellees.

criminal or other wrongful acts." *Cianci v. New York Times Publishing Co.*, 639 F.2d at 64.[8]

A jury could find that the effect of the Art of the Con was not simply to convey the idea that Dolenz was a bad lawyer but rather to produce a specific image of a depraved con man/attorney with a premeditated, fraudulent plan to bilk his client. If accusing an attorney of being a Communist fronter is not a constitutionally protected opinion, *Gertz*, supra, neither is accusing an attorney of being a fraudulent con man in relation to his dealings with his own clients. The court of Appeals must be reversed as it erred in not addressing this point of error.

QUESTION FIVE: THE TRIAL COURT ERRED IN RULING THAT THE STATEMENTS IN THE ART OF THE CON CONCERNING DOLENZ ARE NOT DEFAMATORY AS A MATTER OF LAW.

"In determining whether a publication contains actual defamatory meaning, Texas law looks to the effect the article has on the mind of the 'ordinary reader.' " *Golden Bear Distr. Systems v. Chase Revel, Inc.*, 708 F.2d 944, 948 (5th Cir. 1983), citing, *Rose v. Enterprise Co.*, 617 S.W.2d 737, 740 (Tex. Civ. App. – Beaumont 1981, writ ref'd n.r.e.), Restatement Second of Torts § 614 & Comment b (1977), accord, *Hajek v. Bill Mowbray Motors, Inc.*, 645 S.W.2d 827, 832 (Tex. App. – Corpus Christi 1982), rev'd on other grounds, 647 S.W.2d 253 (Tex. 1983). The alleged defamatory publication, in this case the Art of the Con, must be construed as a whole. *Id.*

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[8] "Any charge of specific misconduct or defamatory fact should be treated as a statement of fact regardless of whether the publisher conveys his deductive opinion alone or with the information to support it." P. Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1254 (1976).

For over 100 years Texas courts have been guided by the rule announced by the Texas Supreme Court in *Cotulla v. Kerr,* 74 Tex. 89, 11 S.W. 1058 (Tex. 1889)

> [i]n the absence of doubt or ambiguity growing out of the language used in the publication, we understand it to be the duty of the court to determine and instruct the jury whether or not it is libelous; but, where there is uncertainty or doubt, it is the duty of the court to give the jury a definition of what is a libel, and leave it to say whether the offense has been proved.

Id. at 1059, see *Denton Publishing Co. v. Boyd,* 460 S.W.2d 881, 884 (Tex. 1971); *Fitzjarrald v. Panhandle Publishing Co.,* 149 Tex. 87, 228 S.W.2d 499, 505 (Tex. 1950). In addition to the rule of *Cotulla* that an "ambiguous statement presents a jury question", *Rose v. Enterprise Company,* 617 S.W.2d 737, 740 (Tex. Civ. App. – Beaumont 1981, writ ref'd n.r.e.), Texas courts have been applying its corollary the "ordinary reader interpretation" for nearly one hundred years in determining whether a statement is defamatory. That rule states:

> The question is: What effect would the publication have upon the mind of the ordinary reader? What construction would he have put on it? For in defamatory language, it is not so much the idea which the speaker or writer intends to convey as what he does in fact convey.

A.H. Belo Co. v. Smith, 91 Tex. 221, 42 S.W. 850, 851 (1897), accord, *Rose v. Enterprise,* supra.

There is no question, when read conservatively, that there is *at least* uncertainty, doubt and/or ambiguity as to whether the Art of the Con, construed as a whole, is capable of defamatory meaning. Therefore, the following result applies:

> [i]f a defamatory meaning *may exist,* then the statement or article is considered ambiguous, and the court must allow the jury to determine whether an ordinary reader would perceive the

> statement as defamatory. (emphasis by italics in original)

Golden Bear v. Chase, 708 F.2d at 948, citing, *Raymer v. Doubleday & Co.*, 615 F.2d 241, 246 (5th Cir.), *cert. denied*, 449 U.S. 838, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980), accord, *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 669 (5th Cir. 1985).

As a number of the statements in the Art of the Con are defamatory, as a matter of law, the Court of Appeals must be reversed as it erred in not addressing this point of error, and this case must be remanded to the trial court.

QUESTION SIX: THE COURT OF APPEALS ERRED IN RULING THAT THE ART OF THE CON AS A WHOLE AND FACTUAL STATEMENTS WITHIN THE ART OF THE CON ARE TRUE OR ARE SUBSTANTIALLY TRUE.

Truth is a complete defense in a libel action; material omissions of fact are not the "truth". "Although the individual statements printed in the Article, if read out of context, were true, the jury found that their overall effect was defamatory." *Golden Bear Distr. Systems v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983). The Fifth Circuit has rejected the contention that truth was a defense to an action where "the defamatory interpretation of the article" was untrue. *Id.* at 949. This has been the law in Texas for over three decades;

> [a]lthough the truth of an alleged libel may be proven as a complete defense, it is not a defense to show that a statement contained in a publication, if taken alone, is literally true, when other facts are omitted which plainly refute the false impression of the partial statement. A statement is not true or even substantially true if, by

> implication, an entirely untrue impression is made by omission of part of the facts.

Id.

The Art of the Con states: "Vail, when he was without a lawyer, was found in contempt of court and fined $500 for filing an affidavit that wasn't properly notarized." This statement contains a falsity. Vail was represented by attorney Al Ellis at the April 18, 1991, contempt hearing, as well as on May 3, 1991, when the Order of Contempt was signed. (Tr. 164) Secondly, it is not either true or substantially true. The Order of Contempt, attached hereto as Exhibit B (also attached to Defendants' Motion for Summary Judgment as Ex. 26) does *not* state that Vail was found in contempt "for filing an affidavit that wasn't properly notarized". The Order of Contempt states that the Court found that Vail "submitted the Affidavit in bad faith". Not only does this omission of the true facts create the false impression that Vail did not submit his affidavit in "bad faith", it omits even more crucial facts which go even further in proving, if that is possible, that the "substantial truth" was *not* reported.

At the April 8, 1991, contempt hearing not only did notary public, Paige J. Denison, admit under oath that she had never seen Vail, including when she notarized "his signature", but John Wall, Esq., counsel for Brenda Lievrouw, alleged that Vail did not even sign the affidavit – that it was forged. Vail, himself, never provided evidence to the contrary (i.e., that the allegedly forged affidavit was signed by him). Contrary to the Order of Contempt, which Respondents had possession of (Tr. 99), they impishly and incorrectly state that Vail was held in contempt "for filing an affidavit that wasn't properly notarized". Then, they omitted the more significant allegation that it was forged in a conspiracy against Dolenz. Next, they omitted the crucial fact supporting that allegation; the notary public's admission of a fraudulent notarization. These gross and flagrant misstatements, untruths and material omissions of fact, certainly establish the fact the

Dallas Court of Appeals committed reversible error in stating "that the article as a whole is a fair, true and impartial account of judicial or official proceedings . . . " Accordingly, the Court of Appeals must be reversed and this case must be remanded to the trial court.

QUESTION SEVEN: THE TRIAL COURT ERRED IN RULING THAT THE ART OF THE CON IS SHIELDED BY THE "NEUTRAL REPORTAGE" PRIVILEGE.

To receive the benefit of the neutral reportage privilege, four requirements must be satisfied (CIANCI, supra):

(1) "Charges of a serious nature must be made in a context in which the very leveling of the charges is newsworthy in and of itself. This generally means that the charges must either relate to a preexisting public controversy or generate a public controversy in their own right.

(2) The charges must be made by a public official or public figure, or by a prominent organization.

(3) The charges must be about a public figure or public official (including, of course, corporations or organizations that qualify for that status).

(4) The reportage of the charges must be "neutral," that is, accurately and disinterestedly republished.

Without addressing each of the requirements, as neither Dolenz nor Vail is a public figure or public official, there can be no question that the Appellees below failed to satisfy requirements 2 and 3 of the neutral reportage privilege. As the neutral reportage privilege clearly does not apply, the Court of Appeals must be reversed as it erred in not addressing this point of error.

QUESTION EIGHT: THE COURT OF APPEALS ERRED IN RULING THAT NO MATERIAL ISSUE OF FACT EXISTED AS TO WHETHER OR NOT THE DEFENDANTS SUBJECTIVELY DRAFTED/PUBLISHED THE ART OF THE CON WITH ACTUAL MALICE.

As Dolenz is a private individual, not a "limited purpose public figure" (see, point of error number one) he does not have to prove actual malice to prevail. *Poe v. San Antonio Exp.-News Corp.*, 590 S.W.2d 537, 40-41 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.) (when defendant failed to prove plaintiff was a limited purpose public figure "it was not incumbent upon plaintiff to prove malice or negate the matter of privilege.") As to actual damages, the negligence standard will apply. However, Dr. Dolenz contends that actual malice also exists.

Respondents' brief in support of their Amended Motion for Summary Judgment, pp. 6 – 7, correctly points out that Texas courts have not adopted the federal standard for summary judgments, but then fails to point out the effect of that different standard on this case. Moreover, the Respondents incorrectly claimed that the holding in *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989) is controlling in the instant matter. The distinction between the federal and Texas summary judgment standards, not discussed by Respondents below, is critical to this case and is clearly delineated by the Texas Supreme Court. The *Casso* Court stated:

> [i]n [the United States Supreme Court's] view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. [citing *Andersen v. Liberty Lobby*, 477 U.S. 242, 322; 106 S.Ct. 2505, 2552-53; 91 L.Ed.2d 202, 273 (1986)]. Texas law, of course, is different. While the language of our

> rule is similar, our interpretation of that language is not. We use summary judgments merely "to eliminate pointedly unmeritorious claims and untenable defenses," *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 675 n. 5 (Tex. 1979), and we never shift the burden of proof to the non-movant unless and until the movant has "establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defenses as a matter of law." *Id.* at 678.[9]

Accordingly, the trial court in question was governed by a substantively and substantially different standard than the federal cases cited by Respondents, and that different standard defined by the *Casso* Court prohibits the ruling made by the trial court. Appellees below wholly rely on the *Casso* case in their incorrect claim that the unilateral affidavit of Glenna Whitley denying the state of mind element of actual malice is sufficient summary judgment evidence to support the lower court's ruling. They are wrong. The *Casso* Court specifically stated:

> [i]f the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. On the other hand, if the non-movant

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[9] On this issue, the Texas Supreme Court further stated: "*Liberty Lobby* and *Celotex* [Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986)] involved only the application of federal procedural law. Nothing in either decision compels us to abandon our established summary judgment procedure either generally or in the particular facts of this case." 556.

> must, in all likelihood, come forth with independent evidence to prevail, then summary judgment *may well be proper in the absence of such controverting proof.*

Casso v. Brand, 776 S.W.2d at 558 (emphasis added). Here such controverting proof existed and was filed. (Tr. 126-171).

Totally contrary to the record herein, the public official defamation plaintiff in the *Casso* case, Mr. "Brand filed a response and support brief, but no summary judgment proof, in response to the motion [for summary judgment]." *Id.* at 553. Accordingly, based on these facts, it is abundantly clear that in *Casso* summary judgment was proper because there was absolutely nothing in the record which could have possibly created a fact issue to counter the unilateral affidavit of the defamation defendant in that case as to his state of mind. Needless to say, as the state of mind of an author is not of a nature which can be effectively countered by opposing evidence, it must be "[approached] with due respect for the difficulty of granting summary judgment" on that basis. *Id.* at 558.

If the trial court had given deference to the obvious inability of anyone to present controverting evidence of someone else's state of mind, as the Texas Supreme Court states must occur, it could not possibly have granted summary judgment relying on two cases, *Casso* and *Carr*, wherein the public figure plaintiffs did not even attempt to put on any controverting proof as to state of mind.

"Actual or express malice need not be proved by direct or extrinsic evidence. Proof of facts and circumstances from which it may be reasonably inferred is sufficient." *Gulf Construction Co. v. Mott*, 482 S.W.2d 778, 784 (Tex. Civ. App. – Houston [14th Dist.] 1969, no writ).

Furthermore, some courts have indicated that not only is summary judgment not to be favored in public figure or public-official defamation actions, it is presumptively inappropriate. *Goldwater v. Ginzburg*, 414 F.2d 324

(2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). The theory is that "actual malice" is a state of mind and issues as to state of mind are ordinarily for the jury. *Herbert v. Lando*, 441 U.S. 153 (1979); *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *White Motor Co. v. U.S.*, 372 U.S. 253, 259 (1963). *Hutchinson v. Proxmire*, 443 U.S. 111, Media L. Rep. (BNA) 1279 (1979) commented:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule" (that defendants' motions for summary judgment are generally granted in defamation cases). The proof of "actual malice" calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition . . . "

The evidence brought to bear in opposition to the motion for summary judgment in this matter (Tr. 126-171) unquestionably supports the reasonable inference that Glenna Whitley was actively involved in co-prosecuting the counterclaims of Dmitri Vail against Petitioner and/or actively attempting to influence a disbarment action brought against Petitioner. Certainly, the Art of the Con, when interpreted as a whole, not to mention the edited statement that Dolenz was "determined to enrich himself at the old man's expense" (Tr. 132) and the edited reference to Petitioner as "Dracula" (Tr. 133) go far beyond supporting a reasonable inference that this article was written with actual malice.

The Court of Appeals unquestionably errs in not even addressing the fact that this summary judgment evidence (wanting to call someone Dracula and concluding that he has an evil state of mind) permits the reasonable inference that Glenna Whitley wrote and/or published the Art of the Con with actual malice.

However, there is plenty more inferential and circumstantial evidence to support this inference. One of the more scathing and damaging false imputations of fact in

the Art of the Con is that the Petitioner had a pattern of taking advantage of elderly persons without attorneys.

In this regard, the Art of the Con alleges that 1) Dolenz defrauded a patient of his into remembering him in her will; 2) that Dolenz obtained a judgment "against Brinkmann, an elderly widow who acted without an attorney" (Ex. A., p. 77); and 3) that "Vail, when he was without a lawyer, was found in contempt of court" (Ex. A, p. 77). However, Dolenz states in summary judgment evidence that the patient wrote her will eight (8) years before she died and had not been his patient for the last six years of her life. (Tr. 159). Moreover, that the elderly, unrepresented, Ms. Brinkmann was represented by Baker & Botts (Tr. 166) and that Dmitri Vail, who was without an attorney, was actually represented by Al Ellis, Esq., when he was found in contempt. (Tr. 164-65)

Also probative of actual malice is the EDITORIAL DOUBT connected with the story, which may be evidence of actual malice. *Tavoulareas v. Washington Post Co.*, 759 F.2d 90, 114-17, rehearing en banc granted, 763 F.2d 1472 (D.C. Cir. 1985); *Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981).

That the Editor had doubt is demonstrated by comments in the record:

> "Let's be really sure about this". 003362; "How do we know this – based on what Dmitri told others and trust document". 003365; "Are we sure?" 003365; "Are we sure about wording?" 003368; "Let's talk". 003368; "Have we talked to him?" 003372; "Theft accusation here – can we confirm?" 003374; "What does Scholl say?" 003375; "We are not lawyers." 003378; "When was this?" 003380; "I'm lost." 003381;

In *Rebozo*, supra, the court held that the resolution of uncertainty in such a way as to cast the plaintiff "in the worst possible light" and to make "a front-page story of

an episode which otherwise might have not have commanded any significant attention" could "amount to evidence of a reporter's reckless disregard for the truth". Likewise in *Tavoulareas*, the Court stated that "a defendant's selection of a reasonable inference from among a number of ambiguities, whether damaging or not, may be evidence that he acted without actual malice", but on the other hand the Court stated, "a defendant's selection of the most damaging inference – an inference which is, in fact, false – may be probative of a determination to incorrectly describe the plaintiff, place him in the most damaging light, and thereby with other evidence demonstrate a state of mind that is probative of a reckless disregard for the truth."

The Dolenz Affidavit in Exhibit "C" shows that the Defendants entertained serious doubts as to the truth of the statements by inferences and discovery. Dolenz asked to review the article before publication for accuracy; this was denied even though GW was aware that inaccuracies would produce a suit if defamatory material was published. She failed to do significant effort in corroborating and verifying her story. She was aware that her sources' reliability were suspect as Wallace Barbee, Nancy White, and Dmitri Vail were involved in producing a false affidavit. That GW failed to contact obvious sources or persons involved in the story to verify information is so suspicious as to create an inference that the Defendants in fact entertained serious doubts and intentionally avoided verification for fear that it would contradict the story the Defendants were about to publish. Additionally, GW should know that when a source has biases or hostilities against a Plaintiff and the Defendants are aware of these biases or hostilities, that awareness is probative of actual malice.

The Defendants should know that half truths are WHOLE LIES, and are the most dangerous lies. As Henry Beecher indicated – they are more likely to lead astray as they are those that most resemble the truth. Defamation

and gossip, like coffee, is usually handed to you without grounds. When we realize that it requires dirt to grow things, we understand why gossip, defamation, and half truths thrive.

Certainly, the Art of the Con as a whole, when viewed in conjunction with these material omissions of fact and these untruths is capable of establishing the reasonable inference that the article was drafted and/or published with actual malice. Accordingly, the Court of Appeals must be reversed.

CONCLUSION

Dolenz is a private figure. He adopts his prior arguments and conclusions. The summary judgment supports a reasonable inference that the Art of the Con was drafted/published with actual malice.

WHEREFORE, Petitioner respectfully prays that this Honorable Supreme Court grant this Petition for Certiorari set the case for oral argument, sustain the questions raised herein, reverse the opinion of the Dallas Court of Appeals and remand the matter to the trial court for further proceedings in accordance with this Court's instructions, and grant Petitioner such other and further relief to which he may be justly entitled.

Respectfully submitted,

LAW OFFICE OF BERNARD J. DOLENZ

BERNARD J. DOLENZ, M.D.
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Attorney, Pro Se, for Petitioner

APPENDIX

NO. 93-1800-H

BERNARD J. DOLENZ,	§	**IN THE DISTRICT**
Plaintiff,	§	**COURT**
	§	
V.	§	**OF DALLAS COUNTY,**
	§	**TEXAS**
SOUTHWEST MEDIA CORPORATION and GLENNA WHITLEY,	§	
	§	**160TH JUDICIAL**
	§	**DISTRICT**
Defendants.	§	

FINAL JUDGMENT

On the 20th day of October, 1993, came on for hearing the Amended Motion for Summary Judgment of Defendants Southwest Media Corporation and Glenna Whitley. The Court, having heard the arguments of counsel and having considered the Motion, the Response, the admissible summary judgment evidence and the other pleadings on file in this cause, is of the opinion that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

It is, therefore, ORDERED that Defendants' Motion for Summary Judgment is in all things GRANTED.

It is FURTHER ORDERED that Plaintiff Bernard Dolenz taking nothing by way of his claims against Defendants.

It is FURTHER ORDERED that all costs are assessed against Plaintiff Bernard Dolenz.

SIGNED this 24 day of November, 1993.

/s/ Lynn Hunt
JUDGE LYNN SKIPWORTH HUNT

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FINAL JUDGMENT Solo Page

(SEAL)

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BERNARD J. DOLENZ, M.D., Appellant No. 05-94-00091-CV V. SOUTHWEST MEDIA CORPORATION AND GLENNA WHITLEY, Appellees	Appeal from the 160th District Court of Dallas County, Texas. (Tr.Ct.No. 93-1800-H). Opinion delivered by Chief Justice McGarry, Justices Baker and Rosenberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellees SOUTHWEST MEDIA CORPORATION AND GLENNA WHITLEY recover their costs of this appeal from appellant BERNARD J. DOLENZ, M.D., from Mark Quintana and Roberta Black as sureties on appellant's cost bond, and from the cash deposit in lieu of cost bond. After all costs have been paid, the clerk of the District Court of Dallas County is directed to release the balance, if any, of the cash deposit to appellant BERNARD J. DOLENZ, M.D.

Judgment entered December 30, 1994.

/s/ Charles W. McGarry
CHARLES W. McGARRY
CHIEF JUSTICE

AFFIRMED and Opinion filed December 30, 1994

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-94-00091-CV

BERNARD J. DOLENZ, M.D., Appellant

V.

SOUTHWEST MEDIA CORPORATION AND GLENNA WHITLEY, Appellees

On Appeal from the 160th District Court
Dallas County, Texas
Trial Court Cause No. 93-1800-H

OPINION

Before Chief Justice McGarry and Justices Baker and Rosenberg
Opinion By Chief Justice McGarry

Bernard Dolenz appeals from a summary judgment entered against him in an action for libel against Southwest Media Corporation and Glenna Whitley. The claim was based upon an article entitled "The Art of the Con," which was written by Whitley and published by Southwest in the April 1992 issue of *D Magazine*. Appellant's

original petition alleged that forty-seven statements in the article were defamatory. On appeal he brings forward eight points of error. We affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was an attorney for a well-known Dallas portrait artist, Dimitri Vail, in a lawsuit against NCNB Texas National Bank. In that suit, Vail claimed that NCNB had breached its fiduciary duty as trustee of Vail's late wife's trust by failing to maintain trust property. In the course of his representation, appellant obtained several promissory notes from Vail, collateralized by Vail's paintings. Appellant assigned the notes to his daughter, Brenda Lievrouw. A series of lawsuits between Vail and appellant followed. Appellant also represented Lievrouw in two lawsuits against Vail, the first seeking reimbursement for the cost of a moving van she had hired to remove Vail's paintings from his home, and release of the paintings to her. Lievrouw's second suit against Vail sought to collect on the promissory notes. As part of that lawsuit, Vail sued appellant, claiming appellant had conspired with his daughter to deprive him of his paintings and had breached his fiduciary duty to Vail.

Vail filed a complaint with the State Bar of Texas, which resulted in a Disciplinary Petition against appellant. After Vail died, appellant was also involved in the probate proceeding of Vail's estate, in which the administrator accused him of breach of fiduciary duty, negligence, and violation of the Texas Deceptive Trade Practices Act.

"The Art of the Con" is an eight page article recounting the relationship between Vail and appellant. It covers the various lawsuits involving appellant and Vail, and includes background and contextual information concerning appellant, Vail, and various individuals involved with the two men. Appellant complained that the article as a whole was defamatory, and isolated forty-seven specific statements contained within the article as objectionable.

The appellees filed a motion for summary judgment contending that: (1) the article as a whole and the specific statements therein described litigation which is a matter of public record, thus the article is a privileged account of court proceedings; (2) Dolenz is a limited purpose figure for the subject matter of this article and defendants neither wrote nor published the article with actual malice; (3) a number of the statements in the article complained of are not "of and concerning" Dolenz and therefore are not actionable; (4) many of those statements in the article which do concern Dolenz are not defamatory; (5) some statements in the article are not defamatory because they are hyperbole and not meant to be taken literally; (6) there are opinions contained in the article which do not imply the existence of false and defamatory facts concerning Dolenz and therefore are not libelous; (7) the article as a whole, and factual statements within the article, are true or substantially true and therefore not libelous; (8) the article constitutes a reasonable and fair comment or criticism on matters of public concern published for general information and is therefore privileged; (9) under the "neutral reportage" privilege, appellees were entitled to report on public controversies such as

those referenced in the article; and (10) defendants did not act with actual malice. The trial court granted the motion without specifying a reason.

STANDARD OF REVIEW

The standard for reviewing summary judgments is well-established. The movant for summary judgment has the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, we must take evidence favorable to the non-movant as true. *Id.* We must indulge every reasonable inference in favor of the non-movant and resolve any doubts in its favor. *Id.* The purpose of a summary judgment is to eliminate claims that are patently not meritorious or untenable defenses. *Gulbenkian v. Penn*, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952).

When the motion for summary judgment alleges more than one basis of support, and the order granting the motion is silent as to the reason for granting the motion, the appellant must show that each independent ground alleged in the motion is insufficient to support summary judgment, and the summary judgment must be affirmed if any of the theories are meritorious. *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989); *Bellair, Inc. v. Aviall of Texas, Inc.*, 819 S.W.2d 895, 899 (Tex. App. – Dallas 1991, writ denied).

PRIVILEGED ACCOUNTS OF JUDICIAL PROCEEDINGS

In his second, third, and sixth points of error, appellant complains that the trial court erred in ruling that the article as a whole, and the specific statements contained therein, were substantially true and privileged as a fair, true, and impartial account of judicial proceedings pursuant to TEX. CIV. PRAC. & REM. CODE § 73.002 (Vernon 1986). In these points of error, appellant discusses only three allegedly defamatory statements. The first is a statement that " . . . Dolenz began to threaten her [a head nurse]. . . . " Appellant contends that the deposition exhibit upon which this statement was based is a letter which actually said: "it has been expressed that Dr. Dolenz has displayed a manner which is abusive and threatening." Appellant contends that this variance creates a fact issue as to whether the article was a substantially accurate account of a judicial proceeding.

The second alleged defamatory statement reads: "Vail, when he was without an attorney, was found in contempt of court and fined $500 for filing an affidavit that wasn't properly notarized." Appellant contends that Vail was represented by counsel at the contempt hearing, and when the contempt order was signed. He also points out that the Order of Contempt does not state that Vail was found in contempt "for filing an affidavit that wasn't properly notarized." The Order of Contempt states the court found that Vail "submitted the affidavit in bad faith."

The third allegedly defamatory statement reads: "[Dolenz obtained a judgment] against Brinkmann, an

elderly widow who acted without an attorney." Appellant contends that Ms. Brinkmann was represented by Baker & Botts.

Under the common law and as statutorily defined, libel is a defamatory statement in written form, published to one or more third persons, that tends to injure a living person's reputation and as a result exposes the person to public hatred, contempt, or ridicule, or financial injury. *See Renfro Drug Co. v. Lawson*, 138 Tex. 434, 160 S.W.2d 246, 248-49 (Tex. 1942); TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).

It is not necessary to consider the factual accuracy of each of the complained of statements. *See Rogers v. The Dallas Morning News*, No. 05-93-00689-CV, slip op. at 5 (Tex. App. – Dallas, September 30, 1994, no writ). We must consider the article in its entirety, and determine whether or not it is substantially true. *Id.* Although it may greatly exaggerate the libel-plaintiff's misconduct alleged in a judicial proceeding, an article is substantially true if an ordinary reader would not attach any more opprobrium to the plaintiff's conduct merely because of the exaggeration. *Langston v. Eagle Printing Co.*, 797 S.W.2d. 66, 69-70 (Tex. App. – Waco 1986, no writ).

The publication by the media of an article or item, which might otherwise be actionable, is privileged and not subject to a libel action, provided it is a fair, true, and impartial account of a judicial proceeding or a fair comment on a matter of public concern. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(1) (Vernon 1986). An article qualifies under article 5432 (repealed 1985, current version at TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(1) (Vernon

1986)), and is thus privileged, if it is a substantially true account of a judicial proceeding. *Langston*, 797 S.W.2d at 69. the question of privilege is one of law when the language used is unambiguous or when the facts and circumstances surrounding the published defamation are undisputed. *Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Tex. 1969).

APPLICATION OF LAW TO FACTS

The summary judgment record in this case contains extensive documentation of judicial and official proceedings against appellant. It is clear from the record that the article is a substantially true account of the varied proceedings concerning appellant. Any variances which may exist are of secondary importance, and would not cause an ordinary reader to attach any greater opprobrium to appellant's conduct. For this reason, the alleged variances do not create a genuine issue of material fact. *See Rogers*, slip op. at 6. We overrule appellant's second, third, and sixth points of error.

Because the trial court's summary judgment may be supported under the theory that the article as a whole is a fair, true, and impartial account of judicial or official proceedings, we need not discuss appellant's remaining points of error.[1]

---

[1] We agree that the judgment may also be affirmed on the ground advanced by the concurring opinion, i.e., that Dolenz is a limited-purposed public figure and neither Whitley nor Southwest acted with malice. We adopt that reasoning as an alternative holding.

The judgment of the trial court is affirmed.

/s/ Charles W. McGarry
CHARLES W. McGARRY
CHIEF JUSTICE

Do Not Publish
Tex. R. App. P. 90
940091F.U05

AFFIRM and Opinion Filed December 30, 1994

(Seal)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-94-00091-CV

BERNARD J. DOLENZ, M.D., Appellant

V.

SOUTHWEST MEDIA CORPORATION and GLENNA WHITLEY, Appellees

On Appeal From the 160th District Court
Dallas County, Texas
Trial Court Cause No. 93-1800-H

CONCURRING OPINION

Before Chief Justice McGarry and Justices Baker and Rosenberg
Opinion by Justice Baker

I agree with the majority that we should affirm the trial court's summary judgment. However, I believe we should do so on other grounds.

In my view, appellant is a limited purpose public figure and appellees proved as a matter of law they did not act with actual malice.

APPLICABLE LAW

A private individual may recover actual damages from a publisher of a defamatory falsehood by showing the publisher knew or should have known the defamatory statement was false. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). The test of liability is one of simple negligence. *Foster*, 541 S.W.2d at 819; *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 83 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.).

However, if the individual is a public official or a limited purpose public figure the plaintiff's burden is far greater. A public official or limited purpose public figure must prove that in publishing the alleged defamatory article the publisher acted with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). The plaintiff must prove the publisher acted with knowledge that the article or statement was false or with reckless disregard of whether it was false. *New York Times Co.*, 376 U.S. at 279-80; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 941 (Tex. 1988).

An individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and becomes a public figure for a limited range of issues. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *A.H. Belo Corp.*, 644 S.W.2d at 84.

Once a party makes allegations against a private person in a judicial proceeding that person effectively becomes a public figure. The publisher can then publish those allegations so long as the account is fair, true, and impartial. *See Hill v. Herald-Post Publishing Co.*, 877 S.W.2d 774, 780, n.8 (Tex. App. – El Paso), *rev'd on other grounds*, No. 94-0587, slip op. (Tex. 1994).

In a libel case, the trial judge initially determines whether the proof shows the plaintiff is a limited purpose public figure. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *A.H. Belo Corp.*, 644 S.W.2d at 83.

A limited purpose public figure must prove at trial the publisher knowingly made a false statement or made it with reckless disregard of whether it was false. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). In defamation cases, actual malice is a term of art distinct from traditional common-law malice. Actual malice requires sufficient evidence to permit the conclusion the defendant in fact had serious doubts about the truth of the publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Casso*, 776 S.W.2d at 558. The plaintiff must offer clear and convincing affirmative proof to support a recovery. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986); *Casso*, 776 S.W.2d at 558.

APPLICATION OF LAW TO FACTS

A. Limited Purpose Public Figure

"The Art of the Con," the subject of appellant's libel suit against appellees, recounts the relationship between Dmitri Vail and appellant. The article discusses several

lawsuits involving appellant and Vail. The article includes background and contextual information about appellant, Vail, and various individuals involved with the two men. The summary judgment evidence shows appellant initially thrust himself into a controversy involving his representation of Dmitri Vail when he gave an interview to *D Magazine*. The interview was about Vail's controversy with NCNB Texas Bank.

"The Art of the Con" discusses the Vail-NCNB suit. It also discusses later litigation between appellant and Vail arising out of that initial relationship and additional matters involving appellant and other litigation. Based on this summary judgment evidence, I conclude appellant is a limited purpose public figure as a matter of law. *See A.H. Belo Corp.*, 644 S.W.2d at 84.

B. Absence of Malice

In my view, appellees' summary judgment shows as a matter of law the author of the article did not believe the allegations were false. The summary judgment evidence also shows the author of the article did not act with reckless disregard about the truth or falsity of the allegations in the article.

In her affidavit, the author stated she did not believe any of the statements in the court records she reviewed were false nor did she believe they were probably false. She did not doubt the truth of the statements she made in the article. She believed the article contained a true account of various allegations the parties made in the

judicial proceedings. Additionally, the affidavit of *D Magazine's* executive showed he had no reason to doubt the accuracy of any factual statement in the article when he approved the story for publication. He had no reason to believe any statement was false or was probably false.

Appellant responded to appellee's summary judgment with his own affidavit and unsworn documents containing conclusions and argument. Appellees objected to most of appellant's affidavit and the documents attached to his response. After a hearing, the trial court sustained all appellees' objections to appellant's responsive summary judgment evidence. Appellant presented no controverting proof that appellees believed the statements in question were false or published with reckless disregard for the truth.

Accordingly, appellees negated actual malice as a matter of law. The trial court correctly granted appellees a summary judgment.

I concur in the majority's decision to affirm the trial court's judgment.

/s/ James A. Baker
JAMES A. BAKER
JUSTICE

Do Not Publish
Tex. R. App. P. 90
940091CF.U05

Order issued February 15, 1995

(Seal)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-94-00091-CV

BERNARD J. DOLENZ, Appellant

V.

SOUTHWEST MEDIA CORPORATION, ET AL., Appellees

ORDER

Before Justices Baker, Devany[1], and James[2]

We **OVERRULE** the Motion for Rehearing filed January 17, 1995 by appellant.

/s/ Tom James
TOM JAMES
JUSTICE

Baker, J., concurs

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[1] Justice Devany, succeeding Justice Rosenberg effective January 1, 1995, has reviewed the motion for rehearing and the record in this appeal.

[2] Justice Joe B. Burnett, a member of the original panel, did not participate in this decision due to his retirement effective August 31, 1994. Chief Justice Charles McGarry substituted for Justice Burnett upon submission of the appeal. Justice Tom James, succeeding Justice Burnett, has reviewed the motion for rehearing, briefs, and the recorded argument.

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 19, 1995

Bernard J. Dolenz, M.D.
6102 Swiss Avenue
Dallas, TX 75214

Mr. Donald C. Templin
Haynes and Boone
3100 NationsBank Plaza
910 Main Street
Dallas, TX 75202-3789

Ms. Stacy E. Sallee
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Mr. Robert C. Jenevein
Haynes & Boone
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901 Main Street
Dallas, TX 75202-3714

RE: Case Number 95-0413
Style: BERNARD J. DOLENZ, M.D.

v.

SOUTHWEST MEDIA CORPORATION and GLENNA WHITLEY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Justice Baker not sitting.

Sincerely,

John T. Adams, Clerk

By /s/ Blanca E. Morin
Blanca E. Morin, Deputy

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 22, 1995

Bernard J. Dolenz, M.D.
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RE: Case Number 95-0413
Style: BERNARD J. DOLENZ, M.D.

v.

SOUTHWEST MEDIA CORPORATION and GLENNA WHITLEY

Dear Counsel:

The motion for rehearing in the above referenced application for writ of error was this day overruled.

Justice Baker not sitting.

Sincerely,

John T. Adams, Clerk

By /s/ Blanca E. Morin
Blanca E. Morin, Deputy

EXHIBIT A

THE ART of THE CON

by Glenna Whitley

Old age was hard enough for Dmitri Vail, a proud but forgotten artist. Then he met Bernard Dolenz, a lawyer who made his last years a nightmare.

THE KNOCK CAME IN THE MIDDLE of their first visit, as they were gathered in the living room of the Highland Park mansion, cooing over a baby just a few months old. The infant seemed to love the booming voice of the elderly gentleman, whose craggy face and white hair were almost as well known in Old Dallas as the bold signature on his paintings: Dmitri Vail. ■ Amanda Albright had brought the infant to see the child's 46-year-old grandmother, Nancy. Amanda had gone down to the courthouse with Nancy and the 86-year-old Vail the day after 1990 began, watching as they exchanged marriage vows. In the months that followed, she frequently visited the decaying old house, where scores of Dmitri's portraits hung or leaned against the walls. ■ Vail answered the door and a man loudly announced that he had come for all of Vail's paintings, furniture, even his jewelry. Everything, he said, except the old man's clothes. ■ Moving into the hallway, Amanda could see the visitor. It was Dmitri's lawyer, Dr. Bernard Dolenz, a squarish bear of a man in his 50s with close-cropped silver hair; behind him was a young woman with black hair and a defiant look on her face.[1] He announced that two men were there to

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[1] Pictures omitted in printing.

begin loading. Sure enough, a moving van was parked outside the once-grand house on prestigious Armstrong Parkway.

"Hell, no!" Vail roared. What happened next is in dispute. According to Dolenz, the old man took a swing at him and missed. Amanda says that Dolenz pushed Vail. Whatever the cause, Vail ended up sprawled on the floor. Dolenz entered the house and told the movers to begin loading.

Amanda rushed to the phone and called her father, Wallace Barbee, a horse breeder who owns the Bar-B Ranch near Denton. Barbee told her to call the Highland Park Police, and within minutes an officer listened as Dolenz explained that he had notes signed by Dmitri totaling between $90,000 and $100,000. The paintings and household furnishings were pledged against the debt, he said, and he had assigned those notes to Brenda Lievrouw, the young woman with him. Since the notes hadn't been paid, Dolenz said, they were there to collect the goods.

When the policeman looked as if he was about to let Dolenz begin moving things out. Amanda persuaded him to talk to Barbee, who was still on the phone. Barbee, though he knew little about what was going on, pointed out to the officer that Dolenz didn't have a court order, that a judge hadn't ruled that the notes were valid and that Dmitri was a longtime Highland Park resident who deserved every consideration.

The officer agreed. He ordered Dolenz to leave. Enraged, Dolenz shook the papers in the officer's face.

"I'm going to sue you and the whole Highland Park Police Department," Dolenz threatened.

Thought Dmitri Vail was in his late 80s and his eccentric behavior had bordered on senility for years, some would later point to that day – April 12, 1990 – as the beginning of his spiral into mental and emotional decay. Friends say Vail, virtually penniless, became the victim not only of his own disintegrating body, but of Bernard Dolenz.

Dolenz has his own version of the Vail saga: He says he was simply trying to help Dmitri, that the trouble all began when Nancy White, in the space of a week, met and married Vail. "Dmitri's glands overwhelmed his brains," says Dolenz. "Then she got him drunk and kept him there." He says the new Mrs. Vail turned Dmitri against him, and he accuses Nancy of having sex with another man. And he claims that Vail's will, in which he leaves Nancy an estate variously estimated to be worth from nothing to $2 million, is invalid. Dolenz argues that he, as the trustee and co-beneficiary of the Dmitri Vail Trust, is the one who should get Vail's paintings.

The courts will decide who gets what. What is clear is that Dolenz – a psychiatrist as well as a lawyer – is one of the most litigious individuals in the history of Dallas. Since 1980, Dolenz has filed 30 lawsuits on his own behalf in Dallas County.

He sued an elderly woman who he claimed slandered him during the course of a lawsuit he filed on behalf of his part-time employee, who happened to be the woman's former daughter-in-law. When a client dared to file a grievance against him with the State Bar of Texas.

Dolenz sued for defamation. When the State Board of Medical Examiners suspended his medical license, Dolenz filed suit against the head of the panel, even though the suspension was probated.

Dmitri Vails' declining years were doomed, for many reasons, to be a sad end to a productive and colorful life. But Bernard Dolenz – with the assistance of his daughter and even some who proclaimed themselves Dmitri's friends – made his final days a nightmare.

TWENTY-FIVE YEARS AGO, A DMITRI VAIL PORTRAIT WAS CONsidered a must in many of Dallas' moneyed circles. "It was almost a disgrace not to have a Dmitri Vail over your mantle," says Lucile Easel, an octogenarian who has sold antiques on McKinney Avenue for more than 25 years. At the peak of his popularity, Vail earned up to $50,000 for his portraits of famous people: his paintings of celebrities such as Carol Burnett, Shirley Jones and Chill Wills hung in the Fair Park Music Hall.

But by the 1980s, Vail's star had faded. No one cared that he had once been famous; art critics found nothing enduring in his work. His painting school no longer attracted enough students to pay the studio rent. His eyesight deteriorating, his hands unsteady, Vail could no longer even paint. Though he didn't own the mansion on Armstrong Parkway, he had the right to live in the house until his death. But he had only a small income, generated form social security and money tied up in a trust established by his third wife Dorothy, who had died in 1971. He began selling off the once-handsome furnishings, or giving them to friends who paid his bills. He was unable to sell the paintings that had once brought him

such handsome fees. Used to living extravagantly, Vail was bitter, convinced that people of "high society" had betrayed him, says one friend. Always eccentric, he began to slip over the line into dementia.

People in Highland Park became used to seeing the garrulous old man exercising in his yard or strutting down the street on his daily walk, dressed in nothing but a Speedo bathing suit. Police began to get reports from neighbors; one called to tell them that Vail, in his bathing suit, had taken a chair to the curb and was sitting with his back to traffic, "cleavage" showing. He began lighting up the outside of his house with enormous spotlights and would sit on his porch, loudly singing or playing music or inspirational tapes. Inside, he kept numerous lights on at all hours of the day and night.

Vail frequently called police for help – once for a "lacerated toe" – or to complain that someone had robbed him of his paintings. One Highland Park detective investigated his allegation that someone had stolen 75 drawings, only to be taken by his housekeeper to Vail's studio, where all the "missing" artwork was stacked.

For years, Vail had friends who tolerated his demands and eccentricities. One was Sue Hamilton, who had befriended Vail in 1976. But she says he was not always easy to like; his booming conversation was usually laced with profanities. He could be funny and charming, then turn rude and ugly if he didn't get what he wanted.

Hamilton saw it as a sign of his increasing age; it seemed to her that by 1987, he was slipping in and out of lucidity. He sometimes didn't recognize friends. In 1989,

Mariano Martinez, who owns several Mexican restaurants where Vail ate free because he had done Martinez' portrait, had to ban the old man after he slapped a manager who refused to give him more wine.

But Hamilton and several others stuck by him. They caught frequent glimpses of the man Vail had been: upbeat, positive, charismatic. He was convinced he was going to make a comeback, that he once again would be appreciated as a genius and again have money to regain his lost splendor. Then, a white knight rode into Vail's life, a man who promised to bring back the glory days: Bernard Dolenz.

WHEN LUCILE TEASEL ANSWERED THE DOOR OF HER ANTIQUE gallery one stormy spring day in 1989, she found an attractive woman in her 50s, blond hair frazzled, wearing mismatched clothes and muddy shoes. Another longtime antique dealer had called Teasel, asking if she might give Caroline Berthelot a job.

But that day when she came in out of the storm, Berthelot said, "Oh no," when Teasel asked if she was interested in working there. "I want to buy your antique shop for $2 million." She then asked if she could take a bath in Teasel's apartment behind the shop. Teasel felt sorry for her and invited her to spend the night. The visitor ended up staying for eight months.

Dmitri's friend Sue Hamilton had managed her own small-scale antique business from an officer in Teasel's gallery for two years.When Berthelot asked about a Vail portrait hanging in the gallery, Hamilton told her that the painter had given it to a woman who had paid an $800 storage bill he owed. But her husband hated the painting,

so she consigned it for sale with Teasel. Hamilton told Berthelot about Vail's history and his current misfortunes, and in mid-August, Berthelot brought Bernard Dolenz over to see the painting.

Though Dolenz now describes himself as a neurologist who spends the majority of his time practicing medicine, in a March 1990 hearing he testified that he saw patients only one and a half days a week. Berthelot worked part time in his legal office, which is also his home on Swiss Avenue. In some legal papers, she listed his address as her residence.

Hamilton told them Dmitri's sad story. Dolenz asked to meet Vail, saying he might be interested in buying some art.

On Aug. 15, Hamilton took Dolenz to visit Vail. Some time later, Dolenz bought $3,000 worth of charcoal sketches, Vail was thrilled. That day, Dolenz also told Vail he had investigated the trust set up by the artist's deceased wife, Dorothy. He told Dmitri that, as his lawyer, Dolenz could sue the trust and get Vail a lot more money. But that wasn't all. Dolenz said he would set up a Dmitri Vail Gallery where the public could see his work. But in order to do that, Dolenz had to gather up all the Vail paintings on loan, consignment or display in Dallas and elsewhere. All Vail needed to do, Dolenz told him, was sign some papers. Hamilton suggested that Dmitri think about it for a while, but Vail wouldn't wait. "I would trust him with my life," Vail told her.

Vail signed a document giving Dolenz his power of attorney, but Hamilton refused to witness his signature.

She didn't have a problem with Vail hiring Dolenz, but something about the power of attorney disturbed her.

In early September, Dolenz wrote Vail a letter, saying that he had contacted the trust officers at NCNB, making them aware of the shoddy maintenance of Vail's house and of Vail's need to keep the lights on at all times to "keep the rats as large as cats confined to darker quarters." Vail was thrilled.

He began calling Dolenz "God-sent," said insisted that his friends meet has new savior. Dmitri bragged that Bernard Dolenz was going to get him millions. He would soon be back on top of the world.

That fall, Dolenz did file a lawsuit on Vail's behalf against NCNB, asking $1 million in damages for withholding money, plus two weeks of profits from the bank and its subsidiaries in punitive damages. Cass Weiland, NCNB's lawyers, says the suit stunned the trust officers, who had tried to work out ways to accommodate Vail. Dolenz also began to collect Vail's paintings – and to attempt to sell some of them for him.

Dolenz wrote Frankie Laine October 31. He told Laine that Vail's paintings were worth $300,000 each, but because he was so fond of Laine, he would sell the singer his portrait for $60,000. Laine declined.

Jean LoMonaco, a gallery owner who had moved to Nashville, had seven of Dmitri's paintings, including his portrait of President John F. Kennedy. She was trying to sell them for Vail. In early September, Dolenz called LoMonaco and demanded she turn over the paintings.

"He was really nasty, and I didn't understand it," she says. "He acted like I wouldn't give him the paintings. I was happy for him to have them, but I needed something in writing." Dolenz presented a letter and sent movers to pick up the artwork.

In December, Dolenz filed a lawsuit against Mariano Martinez in an attempt to get the portrait Vail had given to his friend years earlier. Rather than fight the suit, Martinez agreed to trade the original portrait for a photographic print Martinez had given Vail. "It wasn't worth fighting it," says Martinez. "I always figured I'd buy it back at a garage sale. Who wants a picture of Mariano Martinez in their living room?"

It seemed that all of Vail's friends were eyeing each other, speculating about motives. Berthelot says Hamilton was making an "overly fat" commission on selling Vail's furniture. "I was there to do nothing but help Dmitri Vail," Berthelot says.

Hamilton got a shock when she received a letter that said Vail was suing her over some frames she had agreed to sell for him. She went to Dmitri's house, only to learn that he didn't know what she was talking about. He didn't remember writing and signing a letter demanding the frames, or agreeing that Dolenz should file a suit against her. Hamilton picked up the frames and took them to Vail's home.

Documents authored by Dolenz and signed by Dmitri would soon spark a bitter and expensive war over Vail's assets. It wouldn't be the first time that a paper signed by an elderly person who trusted Dolenz would set off a furor.

THEY CALLED THELMA VICTORIA REYNolds the "Cat Woman." At any given time, the elderly woman had about 50 felines roaming in and out of her Fort Worth home.

It as never proven who drew up the will, but what was undisputed at a later trial was that Reynolds had signed a document in Dolenz's medical office, witnessed by his two nurses, leaving half of her $1.2 million estate to her psychiatrist: Dr. Bernard Dolenz.

The other half went to Reynolds' niece, Earlene Hinton. After Reynolds' death in 1978, Hinton contested the will, arguing that her aunt, in the last years of her life, had been deemed mentally incompetent by a number of other psychiatrists. Dolenz's response: Every other psychiatrist had misdiagnosed her.

"He just considered himself a better doctor than everybody else," says Jim Barlow, an attorney who represented Hinton. Barlow argued to the jury that Dolenz's action is were "unethical, despicable and outrageous." The jury awarded the estate to Hinton.

Barlow knew Dolenz well, as did most attorneys in Fort Worth, because he was a spectacularly prolific litigant. Dolenz filed so many pro se suits – representing himself – that Tarrant County lawyers began to groan when they heard his name. Stating in the late Sixties, Dolenz filed at least 45 suits in the county against patients, business associates, insurance companies and other doctors. "He sees himself as a knight-errant helping the downtrodden," says Barlow.

After losing the fight over Reynolds' will, Dolenz filed defamation suits against Barlow, Hinton and two Dallas psychiatrists who testified that Reynolds was mentally incompetent. He also filed suit against the *Fort Worth Star-Telegram* for a story it ran about the will challenge, which also mentioned that Dolenz had once been sued by a former business associate who claimed he had been hypnotized by Dolenz into signing some legal papers.

Early in his medical practice, Dolenz had been regarded as a fine psychiatrist. In the 1960s, Dolenz established the Fort Worth Neuropsychiatric Hospital. "He was a brilliant fellow, at one time. That's the only nice thing I can say about him," says a Fort Worth psychiatrist who, like many who fear Dolenz, asked that his name not be used.

In 1974, Dolenz was removed from the board of the hospital he had founded. The hospital corporation filed suit, accusing him of taking secret profits when land was purchased for the facility. The hospital's suit was dismissed in 1978 for failure to pursue the case. Dolenz practiced at St. Joseph's Hospital in Fort Worth until 1978, when the neuropsychiatry policy committee recommended that his staff privileges be canceled. He promptly filed suit against the hospital and the policy committee.

"He was not available to his patients," says the psychiatrist who formerly worked with Dolenz at several hospitals, "usually because he was in court. If he had an emergency come up, he would not designate anybody to take backup calls."

And physicians trying to handle Dolenz's patients would frequently find records so inadequate they couldn't prescribe treatment. "I remember very clearly that his patient had a grand mal seizure and there was no information in the chart and he was in court," the psychiatrist says. "He was warned, but he would never make corrections."

At Fort Worth's All Saint's Hospital, Dolenz also ran into problems. Unlike other psychiatrists, he demanded that the head nurse accompany him on rounds. Though she tried to accommodate him, Dolenz began to threaten her. "All the other nurses support her and feel strained when Dr. Dolenz . . . [is] on the unit," reads one administrative report. "On one occasion they have witnessed Dr. Dolenz express a desire that a patient harm [the head nurse]. This is documented." Dolenz, when asked to respond, told the administrator that the nurse "is aggressively hostile and needs psychiatric help." That dispute, too, ended in a lawsuit.

Dolenz boasted to some doctors that what he earned in judgments was tax-free and that the majority of his income came not from his practice, but from lawsuits.

Eventually, Dolenz lost all credibility within the legal community in Fort Worth. "It became, 'Who's he going to sue today?' " Barlow says. Still, some were surprised when Dolenz decided, after years of medical training, to go to law school.

He left his private practice in 1980 and enrolled in Houston's South Texas Law School. He made the move alone: That year he divorced his wife, a nurse with whom he had five children. (He later adopted a college student.)

After graduating in 1983, Dolenz moved to Dallas and began his new life.

HER NAME WAS NANCY WHITE, AND IT seemed to some of Dmitri Vail's friends that she came out of nowhere. Forty-eight, with long, curly bottle-blond hair, she sometimes speaks hesitantly and moves slowly when she's tired, the result of a 20-year battle with multiple sclerosis. The

> At one point, Vail owed Dolenz more than $95,000 – because the attorney had collected some 15 paintings.

disease gives her a fragile, somewhat mysterious air.

Twenty-five years ago, Nancy had been an aspiring artist herself. She had met Vail one afternoon when she and an East Texas friend visited him to talk about Vail painting a portrait of the friend's late husband.

In 1989, she moved back to Dallas from Daytona Beach, Fla. After living with one of her daughters for a while, she moved in with a high-school friend's mother. Looking for a new direction after two failed marriages, she decided to see if Dmitri was still teaching art. He called her in late October. It was impossible to make the old man understand her on the phone, so she wrote a letter praising his work and asking if he was still taking pupils.

In late, November, they finally met again. She took him to a family party during the holiday season where Wallace Barbee was present. "This is the prettiest damn

woman I've ever seen in my life," Dmitri bellowed. "I wish I'd painted her."

In the evenings they went on dates. Neither could drive, so Nancy's daughter Amanda or an old high-school friend provided transportation. Someone else always had to pay; it was clear to everyone, including Nancy, that Dmitri had no money.

One day in December, she visited his house. "We spent the afternoon together, and he said, 'Will you marry me?' " says Nancy Vail. "I said, 'Yes, yes I will.' " They celebrated New Year's Eve with hats and noise-makers, and on Jan. 2, 1990. Amanda drove them to the court-house where Nancy became his fifth wife.

But not everyone was happy for Dmitri. His friend Lois Williams, who had been helping him for two years, doesn't accuse Nancy of marrying Dmitri for money, but she does suggest that perhaps Nancy got interested after overhearing Dmitri boast about getting a lot of money in the lawsuit Dolenz was pursuing. Dolenz and Williams both say that Dmitri showed them a letter in which Nancy introduced herself and promised to have sex with him every night. (The letter, postmarked Nov. 4, reads like a schoolgirl's crush on her teacher, but says nothing about sex. Nancy says that's the only letter she ever wrote Dmitri.)

Nancy met Bernard Dolenz when he came over to have Dmitri sign papers. "He resented me," says Nancy. "He let me know right off I was out of place."

Dolenz was affronted that Dmitri had wed without his knowledge. "It's a very strange situation," says

Dolenz. "They don't even tell me about it and I'm his lawyer." He accuses her of marrying Vail because she thought he owned the house on Armstrong. For her part, Nancy felt protective. "One day Dolenz came over and asked him to sign something," says Nancy. "I asked him what he was signing. He said, 'I don't know.' "

The bad blood wasn't dispelled when, shortly after the wedding, Dmitri and Nancy contacted Warren Lyon, an attorney recommended by a friend, to draw up a new will for Vail. On Jan. 16, Vail signed a will leaving his estate to Nancy, as well as a document giving her his power of attorney. As a courtesy, Lyon called to let Dolenz know that the power of attorney had been changed. Dolenz asked the lawyer to meet with him at the Vail residence on Jan. 22.

Dolenz arrived with Lois Williams, one of Dmitri's only friends who was sympathetic to Dolenz, and taped the meeting. "The insisted on the will being read," says Nancy. She adds that Dolenz "had a fit," saying, "You don't mention your old friend Lois Williams.' "

On the tapes Dmitri repeatedly says that he wants to give the power of attorney to Nancy, but Williams can be heard haranguing the old man to leave it with Dolenz, almost yelling in an apparent effort to make him hear. "She was in his face, pounding on his chest," Nancy says.

Vail repeats over and over: "I want Nancy protected," and says that his estate and the power of attorney should go to her. But how much he understood of the proceedings is unclear. "I'm a mixed-up kid," says Vail at one point. Later, he shouts, "I want money!" and "I need money and I'm not getting any from Dolenz!"

Dolenz never raised his voice; he just quietly said he would withdraw from the suit against NCNB if power of attorney went to Nancy. He refused to consider Lyon's suggestion of a joint power of attorney. A power of attorney is not necessary for a lawyer to represent a client; Dolenz repeatedly refused to answer Lyon's questions about why he needed Vail's power of attorney, except to say that that was their original agreement. Lyon declined to comment for this story.

Clearly, Dolenz's threat to withdraw from the suit had a powerful impact on Dmitri Vail. In response to Dolenz's pressure, the bank had already paid for some electrical and maintenance work on the house. In a signed affidavit, Vail says Dolenz led him to believe that the bank had offered to settle for $100,000, plus $5,000 per month for the rest of his life. According to Nancy, Dolenz also had told Dmitri that if Dolenz withdrew from the suit, no other attorney would handle it. Vail believed him.

No suit – no money. Faced with that possibility, Vail backed down. After Lyon left, Dolenz gave Dmitri a document to sign revoking Nancy's power of attorney and restoring it to Dolenz. In addition, he dictated a codicil to Vail's will, splitting the estate equally among Nancy, Lois Williams and Barbara Scholl, Dmitri's only living child, whom he hadn't seen in more than 60 years. Then, at Dolenz's request, Vail wrote out another copy of the codicil, this one for Dolenz to keep.

Over the next two months, Dmitri's relationship with Dolenz deteriorated rapidly. The Vails discovered that Dolenz had represented Caroline Berthelot in a 1987 fraud suit, brought by Commercial Union insurance, after

Berthelot reported that goods worth almost $250,000, including rare, museum-quality antiques, had been stolen from her home; some of those items later were found at an antique gallery, where she had placed them for sale on consignment.

The insurance company, against the recommendation of its investigator, settled with Berthelot. Dolenz then filed suit against the antique dealer. He lost that suit.

Nancy also became suspicious of Lois Williams. With Dolenz's approval, Williams had sold an antique dining table from Dmitri's home. Dmitri received about $600 – far less than he insisted the table was worth. (Williams says the table was badly damaged and worth only about $100, but that the generous buyer felt sorry for Vail.) Dolenz had also suggested to the bank that Williams receive $7,000 from the trust to paint and redecorate Vail's house, though she was not an interior designer.

The Vails' misgivings mounted when they realized that Dolenz had returned only one of the 15 or more paintings he had collected. When Hamilton asked him why he hadn't given Vail the paintings, Dolenz said it had to do with "climate control"; he told others it was because Vail's home was a "fire hazard." Dolenz was storing them at his own house on Swiss Avenue. Nancy, alarmed, checked Vail's file of copyrights; all the copyrights to the paintings Dolenz had were missing.

The final straw came when Dmitri heard from one of the NCNB trust officers. The bank had no intention of settling. Not only that, the trust income Vail did have coming in would be used to pay the trust's legal fees.

Because of Dolenz's tactics, NCNB had filed a counter-claim against Vail, alleging that his lawyer's claims were "frivolous and fraudulent."

From the top of the world – newly married, convinced he was going to be rich again – Vail plunged into despair. He became terrified of Dolenz. "He could sense he was being maneuvered and he didn't know what to do about it," says Nancy. For several weeks in March 1990, he refused to let Nancy answer the phone or the door. He began drinking wine heavily, for "courage," he told her. On his 87th birthday in March, when Dolenz, Berthelot and Williams appeared at his door with flowers, Vail refused to let them in.

Meanwhile, a flurry of letters passed between the Vails and Dolenz. In a letter dated March 12, Dolenz mentioned, almost as an afterthought, that all of Dmitri's paintings were encumbered by promissory notes signed by Dmitri. "They cannot be sold or removed or disposed of unless the title can be cleared," Dolenz wrote. "Selling or disposing of any of the paintings may subject you to liability, both civil and criminal." Those notes, he said, were assigned to Brenda Lievrouw. In a later letter, Dolenz added: "and I understand she is making demand that those be paid."

Dmitri didn't know what he was talking about. What notes? Who was Brenda Lievrouw? More letters were exchanged. In a March 19 letter, Dolenz couldn't resist a jab at Nancy, saying that Dmitri was happy with his lawyer until after his marriage, "after which time he took to drinking Chablis excessively and alienating friends who were working unselfishly to help him, such as Lois

Williams and Caroline Berthelot." Other friends, however, say that Dolenz and Berthelot were the ones bringing him wine. In legal pleadings from then on, Dolenz painted Nancy as a Scarlet Woman, reiterating the charges about the excessive drinking. He says now that Dmitri had complained within weeks of the wedding that he wanted an annulment because he had caught Nancy in bed with someone else. Dolenz says the old man didn't proceed with the annulment because Nancy kept him "drunk and under wraps and away from the phone."

Then, on April 12, Dolenz, Lievrouw and the movers abruptly appeared at Dmitri's door. Dolenz claimed that everything in the house, except for Dmitri's clothes, was "mortgaged" and he was there to pick up the collateral. The Vails staved him off for the moment, but less than two hours after Dolenz left, they discovered a demand letter in the mailbox. Dated almost a month earlier and signed "Brenda Dolenz Lievrouw," the letter demanded payment of $95,000, plus 15 percent interest, based on four promissory notes allegedly signed by Dmitri.

"I understood from Bernard Dolenz that you had a painting or so [sic] that was going to be sold for $300,000, which would more than clear the notes and return your interest in the paintings," Lievrouw wrote. "I am not interested in your paintings, but I am interested in receiving the monies due pursuant to the notes." From her signature, the Vails realized for the first time that Lievrouw was Dolenz's daughter.

The next day, more documents filled their mailbox. One was a copy of a motion Dolenz had filed to withdraw from Vail's NCNB lawsuit. Though the Vails had pleaded

in a letter with Dolenz not to withdraw, Dolenz told the judge that Vail was uncooperative and had fired him.

The other was a copy of a lawsuit filed in J.P. court, *Brenda Lievrouw vs. Dmitri Vail.* Because the judge had not yet approved Dolenz's withdrawal, he was still Dmitri's attorney. Dolenz was suing his own client. Though Barbee had not been close to Nancy in years – in fact, the couple had fought an acrimonious divorce battle in the early '60s – Barbee decided to help the Vails find another lawyer to continue the NCNB lawsuit, and to fight Dolenz.

Barbee and an attorney friend named Harry Haigler visited Dolenz on April 16. "At first, I was totally impressed," says Barbee. "He seemed like a brilliant guy."

Dolenz was very gracious and willing to answer their questions. Dolenz told them the NCNB suit was a "lawyer's dream" – an old, debilitated plaintiff obviously being defrauded by a big, rich company.

But Dolenz said he was tired of fooling with the old man. He was dropping the bank suit, and Dmitri should get another lawyer quickly. The clock was ticking. NCNB and the FDIC had filed voluminous requests for summary judgment. Vail only had a few weeks to file an answer.

"What about these notes?" Barbee asked. Dolenz explained that those were for his legal fees and expenses. "I've been working for Vail almost full time for six months," Dolenz told him. He claimed that in order to get two of the paintings, those of actor Chill Wills and Carol

Burnett, he had had to pay off an old debt for Vail – thus the promissory note for almost $20,000.

Barbee was completely won over by Dolenz, but Haigler, who had practiced law for years, was suspicious. A lawyer paying a debt that large for a client? That seemed strange, not to mention the fact that Dolenz was abandoning his client in the 11th hour and representing his own daughter against that client to collect debts for him. Haigler was sympathetic, but because his office was in Tyler, he declined to represent Vail.

Another lawyer agreed to help Vail in the Lievrouw suit. He filed a motion to have Dolenz disqualified, saying it was a conflict of interest for Dolenz to represent his daughter against his former client. During the hearing, presided over by Judge Robert Cole, Dolenz danced around that issue.

It was clear, Dolenz told the judge, that Dmitri didn't know what he was doing when he married Nancy. "Don't tell me he's incompetent," Cole told Dolenz. It turned out Cole was the judge who married Dmitri and Nancy – and, Cole says, he wouldn't have married them if he had thought Dmitri was mentally deficient. Cole threw the case out of court for lack of jurisdiction. Undeterred Dolenz simply filed the same suit in state district court.

Barbee, who was acting as Vail's "business manager" without pay, went from lawyer to lawyer, seeing eight or nine in all. None of them would touch either the NCNB suit or the Lievrouw suit, now in state district court. When NCNB's motion for summary judgment went unanswered, a judge ruled in the bank's favor.

Lawyers who later represented Vail say they don't know if Dolenz's suit had any merit. He had accused NCNB's "fat cat" trust officers of "self-dealing," of letting the house collapse around Vail's head, of hiding from Vail the fact that he was a co-trustee.

But it's clear from a 1985 letter that Vail signed "co-trustee," that he knew – at least at one time – he was a trustee and the bank wasn't keeping him in the dark. And it appears that over the years, the trust officers made numerous concessions to Vail. For example, they cut their fees by 45 percent. And they had advanced money to Vail; at one point, he had received a total of $10,000 more than the trust actually provided.

The problem with the trust, according to documents filed in court, was that the bulk of the estate was the house, worth $1.6 million; only $800,000 was income-producing, and taxes, insurance and other expenses came out of the proceeds, before Vail and John McDonough, Vail's son-in-law, received their share. Dolenz says that those expenses should not have come out of Vail's share. Cass Weiland, attorney for NCNB, says that the trust officers had to abide by the conditions of the trust – not rely on sentiments such as "Dorothy would have wanted it that way."

Whether valid or not, the suit against NCNB was a monumental task, and Dolenz already had more than 15 of Dmitri's most valuable paintings, as well as the notes totaling $95,000. It wasn't worth continuing with a case that Vail almost surely would lose.

That's when Dolenz assigned the promissory notes to his daughter, Brenda Dolenz Lievrouw. She maintained

later that the exchange was a legitimate business deal, that she paid her father about $950 a month in exchange for the notes. "I was having financial problems and she had the money to assist me," says Dolenz. Though Barbee had his own business and his own family, he was angry at Dolenz's tactics. In the summer of 1990, with the help of law books, Barbee filed several answers in the Lievrouw case himself, gaining some valuable time. Finally, he found Tamera Boudreau, a young lawyer who was willing to help the Vails on a contingency basis.

On their first visit to her office, Dmitri was lucid, but he ranted and raved about Dolenz, calling him a "demon from hell." At the next meeting, the Vails were to sign a contingency agreement. At the mention of Dolenz's name, Dmitri burst into tears.

When Boudreau began to look into the papers Dmitri had signed, she discovered some peculiarities. For example, a document dated Aug. 29, 1989, setting up the Dmitri Vail Trust, included all his assets and named Bernard Dolenz as trustee *and* co-beneficiary. It was witnessed by Caroline Berthelot and notarized by Brenda Lievrouw – though it's illegal under Texas law to notarize a document relative to any transaction in which the notary might have a financial interest.

Boudreau also learned that Vail had signed a contingency agreement with Dolenz on Aug. 26, 1989, giving Dolenz 40 percent of any settlement with NCNB, before trial and 45 percent of any recovery after a trial. How, then, could Dolenz claim that the four promissory notes were for legal fees?

Dolenz answered that question with another document dated Aug. 29, in which Dmitri agreed to pay Dolenz $5,000 per painting, plus $200 an hour, for recovering scattered artworks. He was also to be reimbursed for expenses. Among those expenses was the payment of $10,000 to Commercial State Bank in Palmer, to obtain the portraits of Chill Wills and Carol Burnett, which were being held as security for a 1986 loan of $11,000 on which Dmitri had defaulted. According to an affidavit filed by Vail, the bank officials told Teasel they would accept $2,000 for each painting. But, according to a letter from Ted Smith, an officer of the bank, Dolenz bought the old note – which had been written off by the bank – for $10,000. He kept the two portraits as security.

For that service, on Sept. 12, Dolenz had Dmitri sign the first promissory note, payable on demand, for $19,372.70, plus 15 percent interest, secured by those two paintings, and several others he had recovered from LoMonaco.

Only a few days later, September 20, Vail signed a second note for $1,000, secured by a painting of Johnny Carson, in return for a loan of that amount from Dolenz. On Oct. 17, Dolenz had Vail sign a third promissory note, secured by all the paintings at the Armstrong house, for $23,002.23. This supposedly included $3,000 for the establishment of the Dmitri Vail Trust, which involved having Dmitri sign a standard two-page form, as well as time spent in "conferences" with Caroline Berthelot and Lois Williams regarding Vail's situation.

On Nov. 15, Vail signed the fourth and final note, secured not only by the paintings, but all his personal

effects; this note totaled $52,500, apparently based on legal fees as well as small purchases Dolenz says he made for Vail. By now, Vail owed Dolenz $95,874.93 – all for collecting some 15 works of art, which Dolenz kept at his house. Almost half of those paintings had been stored at Jean LoMonoco's house in Nashville. Dolenz now says that he actually collected about 60 paintings altogether. Of those, he says, he delivered about 40 to Dmitri's house, charging nothing for that service. There is no reference in Vail's legal papers to such a large delivery.

Confronted with these notes, Dmitri maintained that he'd been tricked. "He told me he signed anything Dolenz put in front of him," Boudreau says. "He had complete trust in the man." During this period, Dolenz was sending out letters attempting not only to find Vail's paintings, but to sell them. There were at least five or six letters from Dolenz to people such as Carson and Betty White, offering to sell them their portraits for between $60,000 and $200,000. Significantly, though he had Vail's power of attorney, Dolenz had Vail sign each letter opposite his signature.

It is clear from doctors' reports that Vail's deteriorating eyesight made it almost impossible for him to read small print. Boudreau began to wonder: Was Dmitri legally competent to conduct business when he met Dolenz? Not only could he not see clearly, Dmitri seemed at times to float in and out of sanity. In late 1990, Boudreau filed a countersuit against Dolenz.

But Boudreau admits that she was intimidated by Dolenz and frustrated by his legal tactics. At one point Dolenz told the court Boudreau had been served with

legal papers that required an answer within 30 days. Boudreau says she never received them. She says that after he "threatened her physically," she turned for help to Al Ellis, past president of the Dallas Bar Association, who agreed to become lead attorney pro bono. The Vails had finally found a real white knight. But for Dmitri, it was too late.

Moving slowly one day in January, Nancy Vail helped an assistant to Al Ellis list the few items that remained in the Armstrong Parkway house; old frames, beat-up furniture, kitchen goods. Nancy had to be out of the house by Jan. 31; she and Barbee had scheduled an estate sale to get rid of everything except Vail's paintings.

Sue Hamilton had handled an earlier sale in the fall of 1991, raising $9,000 for the Vails, despite the fact that Bernard Dolenz had stationed himself across the street and videotaped people leaving with purchases, yelling that what they were doing was illegal, that Vail's possessions were "mortgaged."

But this sale would be different. Not much of value was left. And shortly before Christmas, the 88-year-old painter had contracted pneumonia and died.

For two years, Dmitri had been obsessed with Dolenz. "This played on his mind all the time," says Nancy. "Not a day or moment passed that he didn't think about Dolenz." For Nancy, the end began in early 1991 when Dmitri started throwing food at her and a friend at a restaurant. In the summer of 1991, Judge John Marshall ruled that Vail was mentally incompetent, based on psychiatric examinations requested by Boudreau and Ellis. Psychiatrists at Southwest Medical School concluded that

he suffered from dementia, as well as grandiosity of thinking. In all probability, concluded Dr. Jay Crowder, the artist had suffered from progressively worsening mental illness for several years, possibly since 1985, when he incurred a head injury after wrecking his car. After diagnosing a subdural hematoma, doctors had operated on Vail's brain, but some of the damage to his eyes and brain was irreversible.

Dolenz says that while Vail might have been mentally incompetent by the spring of 1991, the examination of Dmitri is suspect. He points to a "psychosocial assessment" prepared at Zale Lipshy University Hospital. The report says: "According to Mr. Vail, he was referred to the hospital in an effort to bolster his case and to, as he puts it, 'get the doctors on my team.' " (The report also says that Vail went on to accuse Dolenz of stealing his paintings, becoming increasingly angry. "We're going to put him away," he told the social worker.)

But before his death, Dmitri Vail got some measure of satisfaction against the lawyer who had hounded him. On Dec. 2, 1991, Judge Marshall, in response to Ellis' request for sanctions, signed an order giving Dolenz the "death penalty" – striking all of Dolenz's pleadings and ruling that Vail's allegations that Dolenz had committed fraud and misconduct were held to be true by the court. That meant that any award Lievrouw might win from Vail probably would be money that Vail had recovered from her father.

Though Dolenz fought the ruling, the Texas Supreme Court upheld the lower court's determination. He immediately requested a rehearing, and if that is denied,

Dolenz says, he will appeal all the way to the U.S. Supreme Court. "It's the principle of the thing," says Dolenz.

After several requests, Dolenz agreed to an interview at his Swiss Avenue home to show me "the other half of the pancake." His living quarters are upstairs. Downstairs, where he offices, looks more like a warehouse than an office. Porcelain figurines, some still in bubble wrap, sit on tables and on the floor. A large wooden conference table rests on its side against a wall. Files cover a huge marble table.

Dolenz points out several times during our talk that litigation prevents him from telling everything he would like about the case, but he brings out documents that he says show the "scam" and "flim-flam" perpetrated by the NCNB trust officers handling the Dorothy Vail trust. He says they wrote letters to co-trustee John McDonough but didn't carbon them to Dmitri; that they bought stock in a bank for which McDonough served on the board; that they tried to hide that it was their responsibility to repair the house; and that the money shouldn't have come from the trust's income. "He had a fire hazard," says Dolenz. "After I sued them they spent $20,000 in repairs."

When asked why he wouldn't allow Vail to revoke Dolenz's power of attorney, Dolenz says that was part of their agreement. "I didn't want people taking advantage of the old man."

Then he points to "hanky panky" by Al Ellis; an affidavit signed by Barbara Scholl that says Ellis misled her, saying her father's paintings were worth very little. (Ellis says he has never spoken to Scholl.) Dolenz claims

that Scholl has filed a grievance with the state bar against Vail's two attorneys. Then there's the matter of Vail's "false affidavit," which Dolenz says shows "all the lies and misrepresentations" by Barbee and Nancy. Vail, when he was without a lawyer, was found in contempt of court and fined $500 for filing an affidavit that wasn't properly notarized.

Dolenz dismisses the report by Crowder on Dmitri's mental health. "Probably when Dr. Crowder saw him in March 1991, he needed to be detoxed," Dolenz says. "When he ran into Nancy, they gave him the Chablis like it was going out of style." He charges that Ellis didn't show Crowder letters Vail wrote in the fall of 1989 or a videotape that Dolenz made of Vail on Aug. 29 of that year, showing an apparently sound, sane Vail demonstrating his style on the trampoline. The psychiatrist who reviewed that and other evidence on Dolenz's behalf concluded that Vail was competent during that period through March 1990. When *D Magazine* showed Crowder the videotape, he said his diagnosis was unchanged.

Dolenz says that he's not in the lawsuit for the money. "Hey, I'm not going to make a damn thing off this," he says, adding that the whole thing would never have happened if Vail's portrait of JFK had sold, as Dolenz says was planned, to the city of Dallas. "It would have cleared my legal fees," Dolenz says. But the sale fell through; then Vail married Nancy and fired him. "That was not Dmitri doing the talking; it was Nancy," Dolenz says. "This whole thing mushroomed out of proportion. But I'm going to keep my commitment to Dmitri."

Throughout the interview, Dolenz is cordial, even friendly. But he sprinkles veiled threats throughout the conversation. As he escorts John Wall, Brenda Lievrouw's current attorney to the door, Dolenz tells him, loudly enough for me to hear, "By the way, I did get an $8 million defamation award from that lady in Louisiana." He also mentions winning $2 million in a defamation suit against the *Fort Worth Star-Telegram*. "I've warned them to be careful," Dolenz tells Wall. "I could end up owning *D Magazine*." (Dolenz did indeed sue both the *Star-Telegram* and Shreveport resident Virginia Brinkmann, Caroline Berthelot's mother-in-law, for defamation. But Philip Bishop, the *Star-Telegram*'s lawyer for 15 years, says no court has ever awarded Dolenz a judgment against the paper. With regard to the other suit, Dolenz did win an $8 million judgment against Brinkmann, an elderly widow who acted without an attorney.) Before I leave, he's more direct: "I hope you're not coming in to burn Bernie baby," Dolenz says. "I'll go after people with a cleaver if they say things that are not correct."

So, cleaver in hand, Dolenz goes on. After Vail's will was filed in probate court, Dolenz presented the trust document signed by Dmitri. If the court ruled it valid, Dolenz, as trustee and co-beneficiary, would potentially get all assets mentioned in the trust, barring any challenge by others. Accompanied by his daughter and Lois Williams, Dolenz dragged out his old allegations against Nancy and told the court that if the trust was deemed invalid because Vail was non compos mentis, then his marriage to Nancy also should be void.

At the request of Nancy's attorney, Dolenz filed the hand-written codicil, which divided the estate among

Nancy, Lois Williams and Dmitri's daughter. But the judge struck Dolenz's pleadings, saying he had no standing in the matter of Vail's estate.

The Lievrouw trial also is expected to be heard this spring; Ellis has retained Don Lehew, a certified document examiner, who has written a report saying that three of the documents Dolenz claims were signed by Vail are actually forgeries. Meanwhile, Nancy Vail and Wallace Barbee have put the more than 50 paintings from Dmitri's house in storage, waiting for the judge to decide their rightful owners.

One sad irony has emerged. Though Dmitri couldn't sell his paintings while he was alive, their value escalated sharply after his death. Dallas art appraiser Luc de Brocqueville, at Al Ellis' request, estimated the 15 paintings are now worth about $2 million. But that assumes someone wants them.

Nancy has no regrets. Despite Dolenz's accusations, she says she knew all along that Vail had no money, that Dolenz's promises were pie in the sky. If nothing else, she gave her artistic idol pleasure during the last years of his life. "He loved sex, you know," Nancy says, her eyes twinkling. The MS is slowing her down, but she plans to write a book about Dmitri and his method of painting – a last gift to the man she loved.

And though he's dead, Dmitri Vail may yet give one last gift to the world. Last fall, a grievance committee of the Texas Bar Association heard a complaint filed by the Vails against Dolenz. Documents available at the board meetings of the State Bar Association indicate that the

group's general counsel is preparing to file a disciplinary lawsuit against Dolenz.

But even if Dolenz is disbarred, the courts cannot prohibit him from filing lawsuits. He can simply walk out of the courtroom, stroll over to the district clerk's office, pay a filing fee and sue whoever he wants. Dmitri Vail is dead. The man who haunted him lives on.

Glenna Whitley is a senior writer for D Magazine

EXHIBIT B

CAUSE NO. 90-07760-A

BRENDA D. LIEVROUW	§	IN THE DISTRICT
	§	COURT
v.	§	
DMITRI VAIL	§	OF DALLAS COUNTY,
	§	TEXAS
	§	
	§	14TH JUDICIAL
	§	DISTRICT

ORDER OF CONTEMPT

On this the 18 day of April, 1991, came on for consideration the motion for sanctions and show cause hearing ordered by the Court. The parties appeared by and through their respective attorneys of record. The Court after consideration of the pleadings, argument of counsel, and testimony of the witnesses is of the opinion that the Affidavit submitted by Dmitri Vail in response to the Motion for Summary Judgment filed by Brenda Lievrouw was submitted in bad faith and in violation of Rule 166(a).

The Court further finds that Dmitri Vail should be held in contempt of Court for having submitted the Affidavit in bad faith and imposes a fine of $500.00 to be paid within 10 days.

SO ORDERED AND SIGNED this 3 day of May, 1991.

/s/ Don Marshall
PRESIDING JUDGE

EXHIBIT C

AFFIDAVIT

STATE OF TEXAS
COUNTY OF DALLAS

"My name is Bernard J. Dolenz. I am over the age of 18, have never been convicted of a felony, and am competent to make this affidavit.

I have personal knowledge of the facts stated herein, and they are all true and correct.

Glenna Whitley has admitted that she wrote an article, "The Art of the Con" which was distributed in Texas; in particular in the Dallas-Fort Worth area around April 1992. The statements in the article injured me and my reputation and have exposed me to public hatred, contempt, and have impeached my honesty, integrity, virtue, and reputation as a professional, both as a lawyer and as a physician. It also invaded my privacy and placed me in a false light. Various statements alleged in the Article as pointed out under Count One of the Plaintiff's First Amended Original Petition are false and defamatory. These statements in conjunction with the entire article place me in false light and the statements given in COUNT ONE have many distortions and would cause the average reader to find that Dolenz should be placed in a negative light. Various readers of the Article have commented to me about the negative impact upon me and include Lois Williams, Caroline Berthelot, Keith Jensen, and David Knapp. I have received anonymous negative phone calls regarding the Article.

Since Glenna Whitley has indicated that she will not reveal her sources and even considers Al Ellis' statements to be partially excluded, there is no assurance that these witnesses were the sources that Glenna Whitley relied upon for her article. Furthermore, the sources may be from an entirely different community and they may refuse to admit that they are the confidential sources or they may not know that they are the sources Glenna Whitley relied upon. Glenna Whitley had notes in her prepublished articles that suggest that she had serious doubts about the truthfulness of some of the statements. There is some question as to whether Glenna Whitley failed to pursue further investigations and whether or not she left out of her story significant facts. These sources are also needed to determine their bias or hostility against me and whether or not Glenna Whitley was aware of these biases or hostilities; this awareness would be probative of actual malice and should be discoverable. There is a real question as to the reliability of her sources and this information, again, is crucial to prove negligence and Glenna Whitley's awareness about the sources reliability.

In Glenna Whitley's affidavit, she contends that she does not believe that the statements contained in the Article were false and that she did not entertain any serious doubts about the truth of the statements in the Article. I disagree with these contentions and believe that she did entertain serious doubts as to the truth of such statements made. She was requested to have the Article reviewed by me for accuracy before publication which she said that she would do, but failed to do. I had indicated to her that

if there were inaccuracies that I would sue for defamation. In spite of this warning, she failed to have me review the Article for accuracy prior to publication and failed to have the facts in the Article re-checked. She also failed to go to her quoted sources and in particular failed to confirm the content with Lois Williams or Caroline Berthelot. Her failure to contact these obvious sources or persons involved in her story to verify information is so suspicious as to create inference that she in fact entertained serious doubts about the content of the story and intentionally avoided this verification for fear that it would contradict the story that she was about to have published. I personally believe that she did not want to know more information than was readily available to her for fear that it might interfere with her objectives in having the Article published.

Additionally, I contend that she was negligent in failing to ask "key questions" regarding subject matter. In this regard, she failed to ask key questions of me, Lois Williams, and Caroline Berthelot. This verification would have cost her basically nothing in time or money since these sources were already at hand. Her failure to ask critical questions raises subjective doubts about the "truth" of what she was about to publish.

As regards her search of the public records, her Article statements for the most part did not address the public records as allegations. Rather, she published them straightforwardly as facts which were false or distorted as to mislead the reasonable reader. Furthermore, she was negligent in her reporting regarding the public record.

For example, Virginia Brinkmann did in fact have attorneys representing her in the defamation action that Caroline Berthelot and Bernard Dolenz have against Virginia Brinkmann. Dmitri Vail did in fact have attorneys representing him at the time that he was held in contempt of court for making a false affidavit. Glenna Whitley failed to give balance in her Article as she failed to mention that Dmitri Vail was considered to be incompetent by his attorneys when he authored the grievance against Bernard J. Dolenz. Just how Glenna Whitley was able to obtain privileged and confidential information from the Dallas Bar Grievance Committee is unknown, although it is reported in her Article. She has failed to reveal this source but in any event, it reflects her bias and her negligence in publishing this privileged material. The grievance before the Bar Association was hand-written by Wallace Barbee who had it typed; this information comes from a deposition taken from Wallace Barbee. Wallace Barbee was involved in the scheme of making an inappropriate affidavit which caused Dmitri Vail to be held in contempt of Court for filing a false affidavit. The District Court dismissed the grievance against Bernard J. Dolenz. I am unaware of any public documents or information that was available before the Article in "D" Magazine was published.

Since there was a lawsuit pending regarding much of the subject matter in the Article, with many issues in dispute, I believe that there was subjective doubt in Glenna Whitley's mind as to her sources' credibility. There is some doubt about Wallace Barbee and Nancy White Vail in their relationship to Dmitri Vail, as Nancy White Vail

has admitted that she signed Dmitri Vail's name to documents regarding him. This information was given in Nancy White Vail's deposition. The attorneys for Dmitri Vail have also contended that many documents that he purportedly signed were not signed by him. This was reflected in various pleadings that have been alluded to in Glenna Whitley's affidavit and she should have been aware of a high probability that her sources of information were inaccurate. She failed to appreciate her sources probable bias since litigation was present. She also was aware of the hostility of her sources against Bernard J. Dolenz in some instances and that awareness is probative of actual malice.

As regards Glenna Whitley's failure to give at least 7 of her sources names, this suggests that there is a failure of balance in her Article and that there was no neutrality in her gathering of material. Her selections suggested distortions of the truth as many of her sources were defendants in lawsuits. Glenna Whitley controlled the purported facts that she wanted to report and put into her Article and slanted these facts in a manner adverse to Bernard J. Dolenz and strongly suggests the existence of actual malice. I contend that Glenna Whitley and Southwest Media, through its editing process, deliberately distorted or mischaracterized the alleged facts in such a way as to create the probability that the defendants acted with knowledge of falsity or reckless disregard for the truth.

The Article and statements tried to resolve disputed issues in such a way as to cast Bernard J. Dolenz in the worst possible light professionally and tried to make this a sensational story of an episode which otherwise might not have commanded any significant attention. Left out

of the story were significant facts causing the story to have such imbalance as to become evidence of actual malice. Some of these facts include the fact that Dmitri Vail never revoked his revokable Trust, even though his lawyers knew about it. Wallace Barbee in his deposition indicated that Dmitri Vail was always competent in his business transactions and Bernard J. Dolenz has always contended that Dmitri Vail was competent when he created the Dmitri Vail Trust and when Vail signed notes and contracts of employment with Bernard J. Dolenz as his attorney. The Article failed to address the inconsistency that if Dmitri Vail was incompetent at the time he entered into signing various legal papers with Bernard J. Dolenz that it would logically follow that he was incompetent to do any subsequent business with Wallace Barbee, his attorneys and in his marriage to Nancy White. The Article also failed to mention that Dmitri Vail's own attorneys had Dmitri Vail declared incompetent; this is most unusual and probably would be significant enough for publication.

I believe that Glenna Whitley in conjunction with Al Ellis conceived this story in advance of a pending trial to gain advantage legally in a trial regarding Dmitri Vail. Dmitri Vail is quoted as saying as much when he was hospitalized on the psychiatric floor at Southwestern Medical School. This is confirmed by the social history in the medical record. EXHIBIT "D". I believe that Glenna Whitley had a mental set of her story in advance of her investigation and consciously set out to make various statements conform to her preconceived ideas.

In short, I contend that Glenna Whitley involved herself negligently in a form of pandering designed to appeal to

the readers' morbid sense of curiosity and to assist Al Ellis and his litigation and that this style of journalism was endorsed by Southwest Media as this has been considered enormously profitable. This story is tantamount to "sophisticated muckraking" as it has sensationalized purported wrongdoing on the part of Bernard J. Dolenz and was negligently published as in the editorial process there was doubt about veracity or the reliability of the story. Appended hereto is a true and correct copy of some of the editorial remarks of Glenna Whitley's story. This copy shows: "Let's be really sure about this". (003362); "How do we know this – based on what Dmitri told others and trust document". (003365); "Are we sure?" (003365); "Are we sure about wording?" (003368); "Let's talk". (003368); "Have we talked to him?" (003372); "Theft accusation here – can we confirm?" (003374); "What does Scholl say?" (003375); "We are not lawyers". (003378); "When was this?" (003380); "I'm lost". (003381). EXHIBIT "A".

Contrary to Mr. Don Templin's statement in the Amended Motion for Summary Judgment, Bernard J. Dolenz had not PREVIOUSLY SOUGHT . . . PUBLICITY REGARDING HIS RELATIONSHIP WITH VAIL. In fact, the affidavit of Gary McDonald indicates that he was recommended to call Bernard J. Dolenz for a possible article after he had been told about a lawsuit involving Dmitri Vail. This shows that Mr. Don Templin has distorted and misrepresented to the Court facts that are contrary to his own witness affidavits.

I am not a "LIMITED PURPOSE PUBLIC FIGURE" as alleged by the defendants through their attorney Mr. Don Templin. To the contrary, I am a private person and have

not been a candidate for public office in this community; I have not been an entertainer; I have not voluntarily entered into this controversy; I am not a sports figure; I am not a business leader; I do not believe that I can be elevated to a public figure status merely because I represented Dmitri Vail that may have attracted media attention; and I did not solicit publicity for Dmitri Vail, although I did answer an inquiry by Gary McDonald regarding Dmitri Vail. I believe that Mr. McDonald has embellished his affidavit as I distinctly remember telling him that this was a suit in litigation and that I had negative thoughts about people trying lawsuits in the media. I did give him some of my personal views regarding trusts and suggested that he read the pleadings that were on file at the Federal Courthouse.

Furthermore, there has been a judicial determination with a Judgment indicating that I am a PRIVATE PERSON. EXHIBIT "B".

The Article as a whole is substantially untrue and a reasonable reader would hold Bernard J. Dolenz to contempt and ridicule in the greater community by reading the entire Article with its entire content and innuendoes. In this regard, various untrue statements are given with content in CAPS that controvert the statements given. The statements given in CAPS are true and correct. EXHIBIT "C".

The Article as a whole regarding the representation of Dmitri Vail does not seem to be elevated to a matter of public concern as these matters with Dmitri Vail were done pursuant to contract which was clearly reviewed and understood by both Mr. Vail and me. Mr. Vail

reviewed these contracts with several of his friends and in fact signed some of these contracts in their presence. There was full disclosure. Contracts between attorneys and clients are not elevated to public concern under such circumstances in my opinion".

/s/ Bernard J. Dolenz
Bernard J. Dolenz

SUBSCRIBED AND SWORN TO BEFORE ME on this the 8th day of October, 1993 to certify which witness my hand and official seal.

(SEAL) JO HOUGH
NOTARY PUBLIC
State of Texas
Comm. Exp. 02-06-96

/s/ Jo Hough
Notary Public in and
for The State of Texas
My Commission
expires: 2-6-96

CAUSE NO. 93-CV-99

PATRICK E. LEE	)	COUNTY COURT AT LAW
V.	)	NUMBER ONE
BERNARD J. DOLENZ, M.D.	)	CALHOUN COUNTY, TEXAS

SUMMARY JUDGMENT

(Filed Sep. 17, 1993)

On September 17, 1993, came on to be heard the above-entitled and -numbered cause and BERNARD DOLENZ, Defendant, appeared in person. The Plaintiff, PATRICK E. LEE, although noticed of this Summary Judgment hearing by certified mail and regular mail to Plaintiff's last known address, did not appear.

The Court, after reviewing the evidence in the file and hearing testimony and arguments of counsel, and taking judicial notice that the Request for Admissions have not been answered and thereby are deemed admitted as a matter of law, BERNARD DOLENZ, Defendant and private person are entitled to recover of and from PATRICK E. LEE, Plaintiff, the sum of ONE HUNDRED FIFTY-ONE THOUSAND AND NO/100 DOLLARS ($151,000.00), for damages relating to negligence, defamation, and fraud.

IT IS THEREFORE, ALSO, ORDERED, ADJUDGED, AND DECREED that BERNARD J. DOLENZ have and recover of and from Plaintiff, PATRICK E. LEE, the sum of ONE HUNDRED FIFTY-ONE THOUSAND AND NO/100 DOLLARS ($151,000.00), together with interest

from September 17, 1993, at the rate of ten percent (10%) per annum until paid for.

All costs of Court expended or incurred in this cause are hereby adjudged against Plaintiff, PATRICK E. LEE. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary. All other relief not expressly granted herein as denied.

SIGNED THIS 17 DAY OF SEPTEMBER, 1993.

/s/ Illegible
JUDGE PRESIDING

EXHIBIT C

DEFAMATORY STATEMENTS

" " = Statement in "D" Magazine followed by a true statement IN UPPER CASE LETTERS (CAPS).

a. "The Art of the Con".

LOIS WILLIAMS AND CAROLINE BERTHELOT ARE INDEPENDENT WITNESSES WHO WILL STATE THAT BEFORE DMITRI MET NANCY WHITE, THE RELATIONSHIP BETWEEN DOLENZ AND DMITRI WAS POSITIVE AND THAT DMITRI HAD THINGS FULLY EXPLAINED TO HIM, USUALLY IN THE PRESENCE OF ONE OF THESE WITNESSES. DMITRI FULLY UNDERSTOOD ALL DOCUMENTS, INCLUDING HIS TRUST DOCUMENTS AND THE NOTES THAT HE SIGNED. THESE WERE WITNESSED BY LOIS WILLIAMS AND CAROLINE BERTHELOT AND WERE REVIEWED WITH DMITRI IN CONVERSATIONS WHEN DOLENZ WAS AWAY. THEY WILL TESTIFY THAT I WAS WORKING IN DMITRI'S BEST INTEREST AT ALL TIMES. I CONTEND THAT I ALWAYS WORKED IN THE BEST INTEREST OF DMITRI VAIL.

b. " . . . he (Vail) met Bernard Dolenz, a lawyer who made his last days a nightmare".

I BELIEVE THAT HIS LAST DAYS WERE MADE A NIGHTMARE BECAUSE OF NANCY WHITE VAIL AND WALLACE BARBEE, NANCY'S EX-HUSBAND, WHO MADE HIMSELF THE BUSINESS MANAGER FOR DMITRI VAIL; BARBEE ALSO PREPARED AN AFFIDAVIT FOR DMITRI VAIL FOR WHICH DMITRI VAIL WAS HELD TO BE IN CONTEMPT OF COURT FOR THIS

FALSE AFFIDAVIT. BARBEE ALSO PREPARED THE COMPLAINT TO THE GRIEVANCE COMMITTEE. THIS GRIEVANCE HAS BEEN DISMISSED AT THE DISTRICT COURT LEVEL. VAIL WAS DECLARED INCOMPETENT BEFORE JUDGE MARSHALL WHEN HE WAS REPRESENTED BY AL ELLIS AND TAMARA BOUDREAU. (IT IS INCONCEIVEABLE THAT AN ATTORNEY REPRESENTING A CLIENT WOULD SEEK TO HAVE HIS CLIENT DECLARED MENTALL [sic] INCOMPETENT; DMITRI VAIL WAS NEVER PRESENT BEFORE A COURT HEARING REGARDING HIS COMPETENCY). SUBSEQUENTLY, WHEN VAIL WAS PLACED ON LARGE DOSES OF HALDOL AND CONFINED, HIS LIFE IN MY OPINION AS A DIPLOMATE [sic] OF THE AMERICAN BOARD OF NEUROLOGY AND PSYCHIATRY WAS SUBSTANTIALLY SHORTENED.

c. " . . . friends say Vail, virtually penniless, became the victim . . . of Bernard Dolenz".

THE PURPORTED FRIENDS PROBABLY ARE NANCY WHITE VAIL, WALLACE BARBEE, AND BUCK NETTER (THIS MAN [BUCK] WAS CAUGHT IN DMITRI'S BED BY DMITRI HIMSELF; DMITRI THEN WANTED OUT OF THIS MARRIAGE OF A FEW DAYS, BUT WAS KEPT INCOGNITO AND BASICALLY WAS A PRISONER IN HIS OWN HOME ON ARMSTRONG PARKWAY). THIS CAN BE CONFIRMED BY LOIS WILLIAMS WHO PROBABLY WAS DMITRI'S CLOSEST FRIEND BEFORE NANCY WHITE FORBADE HER TO COMMUNICATE WITH DMITRI. DMITRI HAD HIS OWN PRIVATE TELEPHONE AND TRIED SEVERAL TIMES TO CONTACT LOIS BUT WAS CIRCUMVENTED BY HIS "JAILERS".

d. "Since the notes hadn't been paid, Dolenz said, they were there to collect the goods". " . . . a man loudly announced that he had come for ALL of Vail's paintings, furniture, even jewelry". "Amanda says that Dolenz pushed Vail".

DMITRI UNDERSTOOD THAT THESE PAINTINGS WERE GOING TO BE PICKED UP AS HIS HOUSE WAS IMPROPERLY WIRED AND THERE WAS FEAR THAT THE HOUSE WOULD CATCH ON FIRE AND DESTROY THE COLLATERAL PAINTINGS. ADDITIONALLY, WITH NANCY AND BUCK AND BARBEE COUPLED WITH OTHER UNKNOWNS, THERE WAS A QUESTION ABOUT THE PAINTINGS BEING IN PERIL. DMITRI UNDERSTOOD THAT THESE EXCESS PAINTINGS WERE GOING TO BE PICKED UP AND PLACED ON A BONDED WAREHOUSE WHICH ALSO WOULD GIVE PROTECTION TO THE COLLATERAL PURSUANT TO THE NOTES. THE SALE OF THE PAINTINGS FELL THROUGH BASICALLY OF THE INTERFERENCE OF WALLACE BARBEE. LOIS WILLIAMS AND CAROLINE BERTHELOT AND BILLY MITCHELL WERE IN THE PROCESS OF SELLING A MAJOR PAINTING OR TWO.

WHEN BRENDA AND I, ALONG WITH THE MOVERS ARRIVED, DMITRI HAD BEEN DRINKING AND NANCY REFUSED TO HAVE THE EXCESS PAINTINGS REMOVED. SHE EXPRESSED SOME NEGATIVE VIEWS TO DMITRI AND DMITRI BECAME ANGRY AND SURPRISINGLY TOOK A SWING AT ME AND MISSED. I HAD NO CONTACT WHATSOEVER WITH DMITRI AND THIS CAN BE AFFIRMED BY THE MOVERS WHO WERE PRESENT AS WELL AS BRENDA AND THE HIGHLAND PARK POLICE OFFERS [sic] WHO WERE

CALLED TO THE SPOT. I HAD EARLIER TALKED WITH THE HIGHLAND PARK POLICE ABOUT DMITRI AND THE VERY STRANGE THINGS THAT WERE GOING ON IN HIS HOME. THE FEW TIMES THAT I WAS ABLE TO SEE HIM FOLLOWING HIS "MARRIAGE", VARIOUS ITEMS HAD DISAPPEARED FROM HIS HOME AND GARAGE. SOME ITEMS INCLUDED HIS WELDING SET, HIS WOOD LAYS, HIS TOOLS, HIS SATELLITE DISH, AND VARIOUS FILES. DMITRI HAD INDICATED THAT BUCK AND OTHERS HAD REMOVED THESE ITEMS. SINCE THESE HAD BEEN MADE A PART OF HIS TRUST, I HAD CONCERN AND FELT THAT HIS PAINTINGS LIKEWISE WERE IN PERIL, EVEN THOUGH NANCY VAIL AND OTHERS WERE PLACED ON NOTICE OF THE TRUST.

e. "Berthelot worked part time in his legal office, which is also his home on Swiss Avenue".

CAROLINE BERTHELOT NEVER WORKED IN MY LEGAL OFFICE. SHE DID WORK OCCASIONALLY AS A TELEPHONE RECEPTIONIST ON WEDNESDAY'S AT THE CLINIC AS SHE WAS IN DESPERATE FINANCIAL PROBLEMS AND NEEDED MONEY TO EAT ON.

f. "He told Dmitri that, as his lawyer, Dolenz could sue the trust and get Vail a lot more money. But that wasn't all. Dolenz said he would set up a Dmitri Vail Gallery where the public could see his work".

NO DMITRI VAIL GALLERY WAS EVER PROMISED TO HIM BY DOLENZ OR EVEN DISCUSSED. THIS IS A FABRICATION. ADDITIONALLY, I NEVER TOLD DMITRI THAT HE WOULD RECOVER A LOT OF MONEY, LET ALONE ANY MONEY. AS AN ATTORNEY,

I TELL MY CLIENTS THAT THE ONLY THING CERTAIN IN THE LAW IS THE EXPENSE. JUST WHERE THIS FALSE QUOTE COMES FROM IS UNKNOWN.

g. "She (Hamilton) didn't have a problem with Vail hiring Dolenz, but something about the power of attorney disturbed her".

I DID NOT SOLICIT DMITRI VAIL. I WAS INTRODUCED TO HIM BY CAROLINE BERTHELOT AND SUE HAMILTON. THE FIRST TIME THAT I SAW DMITRI, I LOOKED AT SOME OF HIS LINE DRAWINGS AND LATER PURCHASED SOME OF THEM. DMITRI APPROACHED ME ABOUT REPRESENTING HIM AND TOLD ME AN UNBELIEVABLE STORY ABOUT NCNB'S TRUST RELATIONSHIP WITH HIM WHEREIN HE WAS BARELY GETTING MONEY FROM THE TRUST. I TOLD HIM THAT I WOULD INVESTIGATE THE TRUST AND AFTER AN INITIAL INVESTIGATION, IT BECAME APPARENT THAT DMITRI WAS RIGHT. THE TRUST SET UP BY HIS 3RD WIFE FOR HIM HAD MANY IRREGULARITIES SUCH AS BLIND LETTERS TO HIS STEP-SON WHO WAS A BANKER. DMITRI WAS A CO-TRUSTEE AND THE BANK CIRCUMVENTED HIM ON MANY BUSINESS OCCASIONS, EVEN THOUGH THE BANK WAS AWARE OF HIS CO-TRUSTEE STATUS. THE BANK WITHHELD DOCUMENTS FROM VAIL EVEN WHEN THEY WERE REQUESTED. THE BANK, WITH HIS STEP-SON, PURCHASED BANK STOCK IN A BANK THAT HIS STEP-SON WAS PRESIDENT OF WITH TRUST FUNDS.

h. "Dolenz also began to collect Vail's paintings – and to attempt to sell some of them for him".

I DID COLLECT SOME OF VAIL'S PAINTINGS PURSUANT TO A SECOND CONTRACT WITH HIM FOR WHICH HE GAVE ME A NOTE AND WAS VERY PLEASED FOR THE RECOVERY OF APPROXIMATELY 10 (TEN) PAINTINGS. THESE PAINTINGS ARE CURRENTLY UNDER THE CONTROL OF THE DMITRI VAIL ESTATE PURSUANT TO COURT ORDER FROM THE PROBATE COURT. I PERSONALLY DID NOT ATTEMPT TO SELL THE PAINTINGS BUT DID ASSIST LOIS WILLIAMS. I MADE IT CLEAR TO DMITRI THAT I WAS NOT A SALES PERSON; I WAS HIS LAWYER AND SALES WOULD BE UP TO OTHER PARTIES. I DID SEND A LETTER ON BEHALF OF LOIS WILLIAMS TO ONE OF THE HOLLYWOOD STARS.

i. "Hamilton got a shock when she received a letter that said Vail was suing her over some frames she had agreed to sell for him. She went to Dmitri's house, only to learn that he didn't know what she was talking about. He didn't remember writing and signing a letter demanding the frames, or agreeing that Dolenz should file a suit against her".

DMITRI VAIL WROTE ME A LENGTHY LETTER TO THE EFFECT THAT SUE HAMILTON WAS TAKING THINGS FROM HIS HOUSE AND SELLING THEM AGAINST HIS WISHES. THAT IS THE REASON THE LETTER WAS WRITTEN. WHEN I WROTE SUE HAMILTON ABOUT THIS CONDUCT, I ENCLOSED DMITRI'S LETTER TO ME. THE HANDWRITING AND CLARITY OF THOUGHT CONTENT IS AMONG THE MANY EVIDENCES THAT DMITRI VAIL WAS COMPETENT. IN FACT, I NEVER THOUGHT ABOUT ANY

INCOMPETENCY FACTOR ABOUT DMITRI DURING THE TIME THAT I WAS HIS ATTORNEY.

j. "Barlow argued to the jury that Dolenz's action [sic] were "unethical, despicable and outrageous . . . Barlow knew Dolenz well".

JIM BARLOW WAS ON THE OPPOSING END OF A WILL CONTEST WHERE A FORMER PATIENT HAD REMEMBERED ME IN HER WILL. SHE HAD WRITTEN THE WILL APPROXIMATELY 8 YEARS BEFORE SHE DIED AND HAD NOT BEEN A PATIENT OF MINE FOR THE LAST 6 YEARS OF HER LIFE. I DO NOT KNOW WHAT JURY ARGUMENT BARLOW GAVE BUT CERTAINLY BARLOW NEVER KNEW ME WELL. I NEVER SAW HIM SOCIALLY AND HE NEVER HAD BEEN TO MY HOUSE. I HAVE REPRESENTED A CLIENT AGAINST HIM SUCCESSFULLY.

k. " . . . as did most attorneys in Fort Worth, because he was a spectacularly prolific litigant".

MOST ATTORNEYS DID NOT KNOW ME IN FORT WORTH AS I DID NOT ASSOCIATE WITH THEM ON A SOCIAL BASIS. CERTAINLY, I KNEW A COUPLE WHO OFFICED AROUND THE CORNER FROM ME AND AS FAR AS I KNOW OVER THE YEARS, THESE RELATIONSHIPS HAVE BEEN POSITIVE.

l. "Dolenz filed so many pro se lawsuits . . . that Tarrant County lawyers began to groan when they heard his name".

I DO NOT KNOW THE BASIS OF THIS QUOTE. I DID HAVE MANY COMMERCIAL LAWSUITS AND LANDLORD/TENANT PROBLEMS. I DON'T BELIEVE THAT I

HAD ANY MORE LAWSUITS THAN MOST LANDLORDS. IT IS TRUE THAT I FILED MANY LAWSUIT [sic] PRO SE AND IT IS ALSO TRUE THAT I WON MOST OF THEM.

m. "Dolenz had once been sued by a former business associate who claimed he had been hypnotized by Dolenz into signing some legal papers".

THE ATTORNEY WHO INITIATED THIS SUIT WAS REPRIMANDED BY THE GRIEVANCE COMMITTEE. THIS WAS NOT A PATIENT AND THIS PERSON WAS NEVER HYPNOTIZED. HE WANTED ME TO FINANCE HIS BUSINESS VENTURE WHICH I REFUSED TO DO. HIS BUSINESS COLLAPSED BECAUSE OF HIS LACK OF BUSINESS SKILLS. SUBSEQUENTLY, THIS PERSON HAS BEEN SUED BY THE AG'S OFFICE FOR "RIPPING OFF" MINORITIES BY SELLING SIDING ON BUILDINGS FOR EXCESSIVE FEES AND DISCOUNTING THEM TO ONE OF HIS BUDDIES WHO IN TURN WOULD FORECLOSE ON THE PROPERTY.

WHAT LEGAL PAPERS THEY ARE TALKING ABOUT IS NOT CLEAR, ALTHOUGH THIS PERSON'S FATHER WAS A TENANT AND HAD A SIGNED LEASE WITH ME THAT HE BROKE.

n. "In 1974, Dolenz was removed from the board of the hospital that he had founded".

I AM NOT AWARE OF RECEIVING ANY DOCUMENTATION FROM ANYONE IN AUTHORITY THAT I WAS REMOVED FROM THE BOARD OF THE HOSPITAL THAT I FOUNDED. THE FACT IS THAT I WAS ON THE BOARD OF DIRECTORS OF COMPREHENSIVE CARE

CORPORATION AND WAS ONE OF THE LARGEST STOCK HOLDERS FOR MANY YEARS. THE BOARD WANTED ME TO STAY ON, BUT SINCE I NEEDED TO SELL SOME STOCK I COULD NOT REMAIN AS AN "INSIDER" AND DO SO. ADDITIONALLY, THERE WERE SOME IRREGULARITIES GOING ON WITHIN THE BOARD THAT I WOULD HAVE NO PART OF.

o. "The hospital corporation filed suit, accusing him of taking secret profits when land was purchased for the facility".

THERE WERE NO SECRET PROFITS. AT ISSUE WAS A PIECE OF LAND THAT I OWNED AND WHICH I OFFERED TO THE CORPORATION FOR A PARKING LOT WITH ALL OF THE PRINCIPALS OF THE BOARD BEING AWARE OF THIS PURCHASE. WHEN AT A LATER TIME SOMEONE FELT THAT I HAD MADE A COUPLE THOUSAND DOLLARS PROFIT OVER MY INITIAL PURCHASE AND MADE A COMPLAINT ABOUT IT, I TOLD THEM THAT I WOULD BE HAPPY TO RESCIND THE DEAL AS THE PARKING LOT HAD SUBSTANTIALLY INCREASED IN VALUE LIKE I TOLD THEM THAT IT PROBABLY WOULD.

THE PEOPLE WHO MADE THE COMPLAINT OF "SECRET PROFITS" WERE ENTIRELY DIFFERENT FROM THE PRINCIPALS WHO CONTACTED ME FOR THE PROPERTY IN QUESTION.

p. "He was not available to his patients . . . usually because he was in court".

THIS IS FALSE AS I HAD VERY LITTLE COURT TIME WHILE I PRACTICED MEDICINE IN FORT WORTH.

FURTHERMORE, I ALWAYS HAD BACKUP FOR MY PATIENTS BY OTHER PHYSICIANS. NO PATIENT EVER SUFFERED AND NO PATIENT EVER COMPLAINED TO MY KNOWLEDGE. I HAVE HAD NO MEDICAL MALPRACTICE SUITS.

q. "If he had an emergency come up, he would not designate anybody to take backup calls".

THIS IS ABSOLUTELY FALSE AS I DID IN FACT HAVE THE MEDICAL SURGICAL GROUP OF FORT WORTH AS BACKUP. THIS MAJOR SOURCE OF PATIENTS AND CLOSE RELATIONSHIP CREATED JEALOUSY AMONG MY COLLEAGUES. IN ADDITION, I WAS CONSULTANT TO MOST OF THE MAJOR INDUSTRIES SUCH AS GENERAL DYNAMICS AND GENERAL MOTORS AND BELL HELICOPTER. MY PRACTICE WAS ONE OF THE LARGEST IN TARRANT COUNTY AND CERTAINLY I HAD MY SHARE OF PROFESSIONAL JEALOUSY.

r. "And physicians trying to handle Dolenz's patients would frequently find records so inadequate they couldn't prescribe treatment".

THIS DOES NOT MAKE SENSE AS WHY WOULD ANY OTHER PHYSICIANS BE TRYING TO HANDLE MY PATIENTS. CERTAINLY ANY PHYSICIAN WHO WAS INVOLVED IN ANY SUBSEQUENT TREATMENT WOULD BE ABLE TO CALL ME IF THEY HAD ANY QUESTIONS. AS A POINT OF INTEREST, THE STANDARD OF CARE IN THIS COMMUNITY ACCORDING TO DR. DOYLE CARSON AT TIMBER-LAWN IS THAT A PSYCHIATRIST DOES NOT NEED TO KEEP ANY RECORDS ON AN OUTPATIENT PSYCHIATRIC

PATIENT. I DID KEEP RECORDS ON MY PATIENTS AND ON EACH VISIT.

s. " . . . Dolenz began to threaten her".

I NEVER THREATENED ANY HEAD NURSE. IN FACT, DAVID MCGEE WAS ONE OF THE HEAD NURSES AND HE APPRECIATED THE BETTER COMMUNICATION REGARDING MY PATIENTS AND WHAT THEIR TREATMENT PROGRAMS WOULD BE AND THEIR GOALS. HE WILL GIVE TESTIMONY THAT IS QUITE POSITIVE ABOUT THE TREATMENT GIVEN MY PATIENTS AT ALL SAINTS. HE WILL ALSO GIVE TESTIMONY THAT MY RECORDS WERE BETTER THAN MOST OF THE OTHER PSYCHIATRISTS WHO PRACTICED THERE.

t. "On one occasion they have witnesses [sic] Dr. Dolenz express a desire that a patient harm [the head nurse]. This is documented". THIS IS FALSE. ANY DOCUMENTATION THAT STATES THIS IS ALSO FALSE, IF IN FACT SUCH DOCUMENTATION EXISTS.

u. "Dolenz boasted to some doctors that what he earned in judgments was tax-free and that the majority of his income came not from his practice, but from lawsuits".

THIS IS FALSE. JUDGMENTS ARE NOT TAX-FREE AS EVERYONE KNOWS AND CERTAINLY LAWSUITS ARE NOT THE WAY TO MAKE MONEY. USUALLY IN LAWSUITS, EVERYONE LOSES ECONOMICALLY. MOST OF MY MONEY HAS BEEN MADE FROM THE PRACTICE OF MEDICINE. I HAVE HAD A FEW GOOD REAL ESTATE DEALS, BUT IN TERMS OF INVESTMENTS,

LIKE MOST DOCTORS, I HAVE NOT FARED TOO WELL.

v. " . . . where Nancy became his fifth wife". (Dmitri Vail) I BELIEVE THAT NANCY WAS HIS FOURTH WIFE.

w. "Nancy met Bernard Dolenz when he came over to have Dmitri sign papers". "He let me know right off that I was out of place".

I CANNOT RECALL WHEN I FIRST MET NANCY BUT I DO NOT BELIEVE THAT IT WAS AT A TIME WHEN I WAS TO HAVE DMITRI SIGN ANY DOCUMENTS AS I AM NOT AWARE THAT DMITRI SIGNED ANY DOCUMENTS AFTER HIS MARRIAGE EXCEPT THE RENEWAL OF THE POWER OF ATTORNEY WHICH NANCY ALSO SIGNED. I NEVER TOLD NANCY THAT SHE WAS OUT OF PLACE AND DO NOT UNDERSTAND THIS DISTORTION AND WHERE IT CAME FROM.

THIS STATEMENT: "HE ACCUSES HER OF MARRYING VAIL BECAUSE SHE THOUGHT THAT HE OWNED THE HOUSE ON ARMSTRONG" IS FALSE.

x. "In a signed affidavit, Vail says Dolenz led him to believe that the bank had offered to settle for $100,000 plus $5,000 per month for the rest of his life".

THE BANK HAD NEVER OFFERED ANY SETTLEMENT. FURTHERMORE, THE AFFIDAVIT IS SUSPECT SINCE JUDGE MARSHALL SANCTIONED VAIL FOR MAKING A FALSE AFFIDAVIT AND FINED HIM $500 FOR CONTEMPT OF COURT.

"According to Nancy, Dolenz also had told Dmitri that if Dolenz withdrew from the suit, no other attorney would handle it. Vail believed him".

NANCY HAD HIRED MR. LYON TO DRAW UP THE WILL WITHOUT MY HAVING KNOWLEDGE OF SUCH A WILL BEING DRAWN UP. THE WILL LEFT EVERYTHING TO NANCY EXCLUDING DMITRI'S ONLY DAUGHTER. THE NCNB BANK SUIT WAS PENDING WHEN NANCY OBTAINED THE SERVICES OF MR. LYON. MY POSITION WAS THAT I COULD NOT IN ALL GOOD CONSCIENCE REPRESENT DMITRI IF HE HAD OTHER ATTORNEYS.

SUBSEQUENTLY, DMITRI FIRED ME AND I HAD A FORMAL WITHDRAWAL FROM THE FEDERAL COURT WHERE THE NCNB LAWSUIT WAS FILED. NANCY INFORMED ME THAT SHE HAD MR. HAGLER REPRESENTING DMITRI BEFORE/ABOUT THE TIME DMITRI FIRED ME. I DID ASK THE COURT FOR AN EXTENSION OF TIME FOR DMITRI TO ANSWER A SUMMARY JUDGMENT WHICH THE COURT DID GRANT. MR. HAGLER DID REVIEW MY FILE AND WAS QUITE COMPLIMENTARY REGARDING THE WORK THAT HAD BEEN DONE ON IT. MR. HAGLER SUBSEQUENTLY DID NOT FOLLOW THROUGH WITH THE VAILS AND DMITRI LOST HIS CASE ON SUMMARY JUDGMENT. SEVERAL LETTERS WERE WRITTEN TO DMITRI AND NANCY SPELLING OUT THE CONSEQUENCES OF NOT HAVING THEIR SUMMARY JUDGMENT ANSWERED AND THAT SINCE I WAS FIRED WITH A FORMAL WITHDRAWAL THAT I HAD NO FURTHER OBLIGATION TO THEM. I DID NOT SEND A BILL FOR QUANTUM MERUIT AS I THOUGHT THAT

THIS WOULD BE A WASTE OF TIME. THIS NCNB CASE WAS ON A CONTINGENCY BASIS.

y. " . . . at Dolenz's request, Vail wrote out another copy of the codicil, this one for Dolenz to keep".

VAIL ONLY WROTE OUT AN ORIGINAL OF THE CODICIL WHICH HAS BEEN FILED AT THE PROBATE COURT. NO COPY WAS REQUESTED BY ME FOR HIM TO WRITE. HE ASKED ME TO KEEP THE ORIGINAL AND I GAVE HIM A COPY.

z. " . . . some of those items later were found at an antique gallery, where she had placed them for sale on consignment". (Caroline Berthelot).

THIS IS FALSE AS CAROLINE'S STOLEN PROPERTY HAS NEVER SHOWN UP. SOME OF THE STOLEN ITEMS HAD EARLIER BEEN PLACED IN AN ANTIQUE GALLERY. I DID REPRESENT CAROLINE AND DID OBTAIN A SEALED SETTLEMENT FOR AN AMOUNT IN EXCESS OF HER POLICY LIMITS AS I HAD SUED THE CARRIER FOR BAD FAITH AS WELL.

"The insurance company, against the recommendations of its investigator, settled with Berthelot. Dolenz then filed suit against the antique dealer. He lost that suit".

I DO NOT KNOW WHO THE INVESTIGATOR WAS BUT THE CASE WAS BEING TRIED WITH THE JURY HAVING BEEN SELECTED. THE CASE WAS SO BAD AGAINST THE CARRIER THAT THE COMPANY IN BOSTON SETTLED THE CASE SUBSTANTIALLY IN EXCESS OF THE POLICY LIMITS.

I DID FILE SUIT AGAINST WALTER DELIPSEY FOR CONVERSION OF MERCHANDISE THAT HE HAD

WHICH HAD BEEN CONSIGNED BY CAROLINE. WHILE WE DID NOT RECEIVE MONEY DAMAGES AT THE COURTHOUSE, WE DID HAVE THE RETURN OF ALL OF THE MERCHANDISE THAT WALTER DELIPSEY HAD CONVERTED.

aa. " . . . all the copyrights to the paintings Dolenz had were missing".

THE COPYRIGHTS WERE REVIEWED AND DMITRI HAD THE ORIGINALS AT HIS PLACE. I HAVE SUSPECTED THAT WALLACE BARBEE TOOK HIS COPYRIGHT FILE. I HAVE PERSONAL KNOWLEDGE OF THOSE BEING PRESENT WITH DMITRI AFTER JANUARY OF 1990. DMITRI KEPT THESE IN A FILE ON A TABLE WHERE HE COULD FREQUENTLY REVIEW THEM. I BELIEVE THAT NANCY TAINTED DMITRI REGARDING ME BY ACCUSING ME OF HAVING THESE DOCUMENTS.

bb. "Other friends, however, say that Dolenz and Berthelot were the ones bringing him wine". (Dmitri Vail).

I NEVER BROUGHT WINE TO DMITRI AND IN FACT HIS FRIENDS KEPT HIM FROM WINE AS HE HAD BEEN AN ALCOHOLIC IN THE PAST. DMITRI WAS QUITE BRIGHT AND ALERT PRIOR TO HIS MARRIAGE AND DURING THE TIME THAT I REPRESENTED HIM. I HAVE A VIDEO-TAPE SHOWING HIS ALERTNESS. THIS VIDEO-TAPE IS ALSO DONE ON THE DATE THAT HE SIGNED HIS TRUST INSTRUMENT. IT ALSO SHOWS THE PAINTINGS THAT HE HAD RECEIVED BACK FROM THE STORAGE THAT HE HAD JUST ABOUT LOST FOR FAILURE TO PAY STORAGE FEES.

cc. "Dolenz claimed that everything in the house, except for Dmitri's clothes, was 'mortgaged' and he was there to pick up the collateral".

THIS IS FALSE AS WE WERE THERE ONLY TO PICK UP THE EXCESS PAINTINGS AS THEY WERE IN PERIL AS PREVIOUSLY DESCRIBED. BEFORE COMING, DMITRI WAS AWARE OF OUR COMING TO PICK UP THE EXCESS PAINTINGS. THE IDEA THAT WE WERE THERE TO TAKE "EVERYTHING" IS ABSOLUTELY RIDICULOUS. THE PAINTINGS WERE TO BE STORED IN A BONDED WAREHOUSE FOR PROTECTION.

dd. " . . . Dolenz was abandoning his client in the 11th hour and representing his own daughter against that client to collect debts for him".

I NEVER ABANDONED DMITRI. HE ABANDONED ME AFTER NANCY AND BUCK AND WALLACE BARBEE "BRAINWASHED" DMITRI. I NEVER REPRESENTED MY DAUGHTER TO COLLECT DEBTS AGAINST DMITRI. I DID ASSIST HER TO COLLECT HER $300+ FEE THAT WAS PAID FOR THE BONDED MOVING TRUCK WHICH SHE WAS OUT AND BECAUSE DMITRI HAD FIRED ME. THERE WERE NO CONFIDENCES USED IN MY RELATIONSHIP WITH DMITRI IN ASSISTING MY DAUGHTER IN THE COLLECTION OF HER $300+. IN FACT, THE NOTE ALLOWED FOR THE PICKING UP OF THE COLLATERAL AND WAS COMMON KNOWLEDGE TO DMITRI AND HIS CLOSEST FRIENDS. WHY DMITRI CHANGED HIS MIND FOR THE PICKING UP OF THESE PAINTINGS PROBABLY RELATED TO HIS BEING ON CHABLIS WINE AND HAVING NEGATIVE INPUT REGARDING ME FROM

NANCY, AMANDA HER DAUGHTER, AND WALLACE BARBEE, NANCY'S EX-HUSBAND.

ee. "During the hearing, presided over by Judge Robert Cole, Dolenz danced around that issue". (Motion to have Dolenz disqualified).

JUDGE COLE MARRIED DMITRI AND NANCY. HE INDICATED THAT DMITRI WAS COMPETENT AT THE TIME HE MARRIED THEM. THE EDITORIAL COMMENT DANCING AROUND IS BASICALLY AN OPINION WHICH I THINK IS A DISTORTION AND WHICH WOULD GIVE THE READER A FALSE IMPRESSION OF IMPROPRIETY. THIS ŒEARING DEALT WITH THE $300+ FEE AND PROBABLY DISQUALIFICATION. I BELIEVE THE JUDGE SAID THAT HE LACKED JURISDICTION. NOTHING FURTHER WAS DONE BY MY DAUGHTER TO COLLECT THE $300+.

THE STATEMENT THAT "Dolenz simply filed the same suit in State District Court" IS FALSE. HOWEVER, MY DAUGHTER DID FILE SUIT REGARDING HER NOTES AS WAS APPARENT THAT THE SALE OF A PAINTING HAD BEEN COMPROMISED APPARENTLY BY THE CONDUCT OF WALLACE BARBEE. BRENDA, MY DAUGHTER, HAD JOHN WALL REPRESENT HER AND HE STILL IS REPRESENTING HER ON THIS CASE.

ff. "She (Boudreau) says that after he (Dolenz) 'threatened her physically', she turned for help to Al Ellis . . . who agreed to become lead attorney pro bono".

I NEVER THREATENED THIS FEMALE ATTORNEY. SHE THREATENED ME BY SAYING THAT SHE WOULD "GET MY BAR CARD". ANYONE WHO KNOWS ME

WILL TESTIFY THAT I AM NOT A VIOLENT PERSON. ADDITIONALLY, AL ELLIS IS NOT A PRO BONO ATTORNEY AS HE HAS SUBMITTED DOCUMENTATION TO THE PROBATE COURT FOR FEES. HE ALSO IS ON A CONTINGENCY BASIS REGARDING THE VAIL V. DOLENZ CROSS-ACTION.

gg. "Vail, when he was without an attorney, was found in contempt of court and fined $500 for filing an affidavit that wasn't properly notarized".

FIRST OF ALL, VAIL HAD AN ATTORNEY WHEN HE WAS FOUND IN CONTEMPT OF COURT AS THE COURT RECORDS WILL REFLECT. I BELIEVE THAT BOUDREAU AND AL ELLIS WERE HIS ATTORNEYS AT THAT TIME.

hh. "He also mentioned winning $2 million in a defamation suit against the FORT WORTH STAR TELEGRAM".

THIS IS FALSE. THE SETTLEMENT OF THIS DEFAMATION SUIT WAS IN MY FAVOR AND IS UNDER SEAL. THIS IS A FALSE QUOTE.

ii. "Underterred, [sic] Dolenz simply filed the same suit in state district court".

DOLENZ DID NOT FILE THIS SUIT IN DISTRICT COURT. THIS IS A FALSE STATEMENT AND THERE IS NO DOCUMENTATION IN THE RECORD THAT WOULD SUPPORT THIS FALSE STATEMENT.

jj. "It wasn't worth continuing with a case that Vail almost surely would lose".

THIS IS FALSE AS WALLACE BARBEE ATTEMPTED TO HAVE A FURTHER EXTENSION OF TIME WITH THE FEDERAL COURT. FURTHERMORE, IT IS MY BELIEF THAT THE CONDUCT OF NCNB BANK AND ITS TRUST OFFICERS WAS CONTRARY TO THE TEXAS TRUST ACT AND THAT DMITRI VAIL HAD A STRONG CASE.

kk. "For example, a document dated Aug. 29, 1989, setting up the Dmitri Vail Trust, included all his assets and named Bernard Dolenz as trustee AND co-beneficiary".

THIS IS A FALSE STATEMENT AS DOLENZ WAS NOT A CO-BENEFICIARY. THERE IS NO DOCUMENTATION IN THE TRUST THAT WOULD SHOW THAT DOLENZ WAS A CO-BENEFICIARY.

ll. " . . . notarized by Brenda Lievrouw – though it's illegal under Texas law to notarize a document relative to any transaction in which the notary might have a financial interest".

THIS IS FALSE AS IT IMPLIES THAT BRENDA LIEVROUW IN CONJUNCTION WITH BERNARD J. DOLENZ DID A NOTARIZATION IMPROPERLY. THERE WAS NO FINANCIAL INTEREST AT THE TIME OF THE NOTARIZATION BY BRENDA LIEVROUW. THIS WAS MERELY A VERIFICATION OF HIS SIGNATURE.

mm. "On Oct. 17, Dolenz had Vail sign a third promissory note . . . for $23,002.23. This supposedly included $3,000 for the establishment of the Dmitri Vail Trust, which involved having Dmitri sign a standard two-page form, as well as time spent in 'conferences' with

Caroline Berthelot and Lois Williams regarding Vail's situation".

THIS STATEMENT IS UNTRUE AS THE BILLING REPRESENTED SUBSTANTIALLY MORE THAN WHAT IS DESCRIBED ABOVE.

nn. " . . . this note totalled $52,500, apparently based on legal fees as well as small purchases Dolenz says he made for Vail".

THIS IS FALSE AS THERE WERE NO SMALL PURCHASES INCLUDED IN THIS NOTE.

oo. "It is clear from doctor's reports that Vail's deteriorating eyesight made it almost impossible for him to read small print . . . not only could he not see clearly, Dmitri seemed at time to float in and out of sanity".

WHILE VAIL WAS UNABLE TO PAINT WITH FINE DISCERNMENT, HE WAS ABLE TO SEE AND IN FACT READ BOOKS ABOUT WHICH HE GAVE COMMENTS AND REVIEWS TO LOIS WILLIAMS. HE DID NOT WEAR GLASSES. DURING THE TIME THAT I KNEW DMITRI VAIL, HE DID NOT WEAR GLASSES AND WAS ABLE TO READ AND WRITE QUITE WELL. VAIL WROTE SEVERAL HANDWRITTEN LETTERS WHICH WERE LUCID AND LEGIBLE. I SENT HIM TO THE HEAD OF THE OPTHOMOLOGY DEPARTMENT AT SOUTHWESTERN MEDICAL SCHOOL WHERE HE WAS DIAGNOSED AS HAVING SOME MACULAR DEGENERATIVE DISEASE WHICH PRIMARILY INVOLVES FINE AND SMALL DISCRIMINATION.

pp. "After diagnosing a subdural hematoma, doctors had operated on Vail's brain, but some of the damage to his eyes and brain was irreversible".

THIS IS NOT TRUE AS THE SUBDURAL DID NOT IMPACT UPON HIS EYE DISEASE. VAIL DID NOT SUFFER ANY IRREVERSABLE BRAIN DAMAGE BECAUSE OF HIS SUBDURAL AS IS FREQUENTLY THE CASE WHEN THE SUBDURAL IS RECOGNIZED AND PROPERLY EVACUATED.

qq. "That meant that any award Lievrouw might win from Vail probably would be money that Vail had recovered from her father".

THIS IS PURE SPECULATION AND HAS NO PLACE IN LAY ARTICLES. FURTHERMORE, THIS PLACES THE WRITER IN A ROLE AS AN ATTORNEY. THIS DISTORTION FURTHER PLACES DOLENZ IN A FALSE LIGHT BEFORE THE PUBLIC.

rr. " . . . against Brinkmann, an elderly widow who acted without an attorney".

THIS IS FALSE AS MRS. BRINKMANN HAD AN ATTORNEY AND WAS REPRESENTED BY BAKER & BOTTS.

ss. "And though he's dead, Dmitri Vail may yet give one last gift to the world". (disbarrment of Dolenz)

THIS IS PURE SPECULATION AND IS DEFAMATORY WHEN TAKEN IN CONJUNCTION WITH THE OTHER FALSE STATEMENTS GIVEN IN THE ARTICLE. THE ARTICLE AS A WHOLE WITH ITS INNUENDOES ARE DEFAMATORY TO THE USUAL READER WHO DID NOT KNOW DOLENZ.

Supreme Court, U.S.
FILED
MAR 8 1996
CLERK

No. 95-1256

In The

Supreme Court of the United States

October Term, 1995

BERNARD J. DOLENZ, M.D.,

Petitioner,

v.

SOUTHWEST MEDIA CORPORATION and GLENNA WHITLEY,

Respondents.

On Petition For Writ Of Certiorari To The Texas Supreme Court And The Fifth Court Of Appeals

BRIEF IN OPPOSITION FOR RESPONDENTS SOUTHWEST MEDIA CORPORATION AND GLENNA WHITLEY

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39 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

This Court lacks jurisdiction to grant a writ of certiorari because the Dallas court of appeals' opinion is based upon an independent and adequate state ground.

(In response to Petitioner's Questions 1-8)

The court of appeals properly affirmed the trial court's summary judgment on the ground that the Article as a whole is a fair, true, and impartial account of judicial or official proceedings and is therefore privileged under Section 72.003 of the Texas Civil Practice and Remedies Code.

(In response to Petitioner's Questions 2, 3 and 6)

The court of appeals properly concluded that: (i) the Article is a substantially true account of various judicial and official proceedings against Petitioner; (ii) any alleged variances are of secondary importance and would not cause an ordinary reader to attach any greater opprobrium to Petitioner's conduct; and (iii) any alleged variances do not create a genuine issue of material fact.

(In response to Petitioner's Questions 2, 3 and 6)

The court of appeals properly affirmed the trial court's summary judgment on the alternative ground that Petitioner is a limited purpose public figure for the subject matter of the Article and neither Ms. Whitley nor Southwest Media acted with malice.

(In response to Petitioner's Questions 1 and 8)

Petitioner improperly seeks certiorari review of alleged errors of the trial court that were not addressed by the court of appeals in affirming the summary judgment.

(In response to Petitioner's Questions 3, 4, 5 and 7)

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner: (Appellant is an attorney representing himself)	Bernard J. Dolenz, M.D. 6102 Swiss Avenue Dallas, Texas 75214
Respondents: (Appellees in the court of appeals, defendants and counter-plaintiffs in the trial court)	Southwest Media Corporation formerly located at: 3988 North Central Expressway Suite 1200 Dallas, Texas 75204 Glenna Whitley 8303 San Fernando Way Dallas, Texas 75218
Counsel for Respondents:	Donald C. Templin Michelle E. McCoy Haynes and Boone, L.L.P. 3100 NationsBank Plaza 901 Main Street Dallas, Texas 75202-3789

Pursuant to Supreme Court Rule 29.6, Respondent Southwest Media Corporation is a subsidiary of American Express Publishing, Inc., which is a subsidiary of American Express Corporation. Southwest Media Corporation does not have any nonwholly-owned subsidiaries.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Southwest Media Corporation ("Southwest Media") and Glenna Whitley ("Ms. Whitley") (collectively "Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari filed by Petitioner Bernard J. Dolenz, M.D. ("Petitioner" or "Mr. Dolenz").

I.

OPINIONS BELOW

This is a libel case. Petitioner filed this lawsuit against Respondents, claiming that Respondents libeled him through Southwest Media's publishing, in the April 1992 issue of *D Magazine*, an article written by Ms. Whitley entitled "The Art of the Con" (the "Article"). Petitioner complained of forty-seven statements in the Article that he claimed were defamatory. The trial court granted summary judgment in favor of Respondents on all of Petitioner's claims, without specifying a basis for its ruling.

The court of appeals affirmed the summary judgment on the ground that the Article as a whole was a "fair, true, and impartial account of judicial or official proceedings" and is therefore privileged under Section 72.003 of the Texas Civil Practice and Remedies Code. As an alternative holding, the court held that Petitioner is a limited purpose public figure and that neither Southwest Media nor Ms. Whitley acted with malice.

Mr. Dolenz filed an application for writ of error seeking review by the Texas Supreme Court. On October 19, 1995, the Texas Supreme Court refused to exercise its

discretionary jurisdiction and denied Mr. Dolenz's application with the notation "writ denied."[1]

II.

RESPONSE TO PETITIONER'S STATEMENT OF JURISDICTION AND OBJECTIONS TO JURISDICTION OF THIS COURT TO GRANT A WRIT OF CERTIORARI IN THIS CASE

A. Mr. Dolenz has failed to allege a proper basis for jurisdiction.

Mr. Dolenz purports to invoke this Court's jurisdiction under 28 U.S.C. § 1254, which provides that "[c]ases in the courts of appeals may be reviewed by [this Court] . . . by writ of certiorari. . . . " *See* 28 U.S.C. § 1254(1). Section 1254 of Title 28, however, "governs the routing of cases from the *federal* courts of appeals to the U.S. Supreme Court." *See* Commentary on 1988 Revision to 28 U.S.C. § 1254 (emphasis added); *see also* Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed.) (hereafter *Supreme Court Practice)* at § 2.1.

All proceedings in this case were conducted in Texas state courts. As a result, if this Court has jurisdiction to grant a writ of certiorari in this case, it would be under *section 1257* of Title 28, which provides for this Courts' discretionary review of final judgments or decrees "rendered by the *highest court of a State* in which a decision could be had." 28 U.S.C. § 1257(a) (emphasis added); *see also* Commentary on 1988 Revision to 28 U.S.C. § 1257

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[1] The docket notation "writ denied" signifies that the Texas Supreme Court is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the state as to require correction. *See* Tex. R. App. P. 133(a).

(section 1257 "governs the routing of cases from the *highest state courts* to the U.S. Supreme Court.") (emphasis added); *Supreme Court Practice* at § 3.1. Mr. Dolenz has failed to allege a proper statutory basis for this Court to grant a writ of certiorari.

B. Mr. Dolenz cannot establish this Court's jurisdiction to grant a writ of certiorari because the judgment of the Texas appellate court is based on state law grounds.

Mr. Dolenz's petition for a writ of certiorari faces another fundamental – and fatal – jurisdictional flaw.

Because the Texas Supreme Court denied discretionary review of this case, the Dallas court of appeals' opinion is the proper focus for this Court in determining whether review by certiorari is proper. The Dallas court of appeals affirmed the trial court's summary judgment on the ground that the Article as a whole is a fair, true and impartial account of judicial or official proceedings, and the Article is therefore privileged under section 73.002 of the Texas Civil Practice and Remedies Code. (App. 10)

1. The Dallas court of appeals' decision is based on state law.

Supreme Court Rule 10, which establishes "considerations governing review on certiorari," speaks in terms of cases in which "a state court . . . *has decided* an important question of federal law. . . . " Sup. Ct. R. 10 (emphasis added). Likewise, this Court's Rule 14.1(g)(i) imposes upon Mr. Dolenz the burden to include in his statement of the case a "specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising

them *and the way in which they were passed on by those courts. . . . "* Sup. Ct. R. 14.1(g)(i) (emphasis added).

Mr. Dolenz did not – and cannot – meet this burden for a very simple reason: the Dallas court of appeals' decision was based on state law grounds; specifically, section 73.002 of the Texas Civil Practice and Remedies Code. Mr. Dolenz does mention on page 1 of his petition for writ of certiorari the instances in which he brought First Amendment case law to the *trial court's* attention, *see* Petition at 1; however, as discussed below, the court of appeals decided this case based solely on a Texas statute.

2. Section 73.002 of the Texas Civil Practice and Remedies Code is an "adequate and independent" state ground for the decision in this case.

Significantly, the Dallas court of appeals' opinion is based upon a Texas statute and Texas case law interpreting that statute. (App. at 7-10) Thus, it is clear from the face of the opinion sought to be reviewed that the Texas court's exclusive reliance on TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 constitutes an adequate and independent state ground of decision, and, as a result, this Court lacks jurisdiction to grant a writ of certiorari in this case. *See generally Supreme Court Practice* at § 3.1 p. 107.

In a footnote at the end of its opinion, the Dallas court of appeals made an "alternative holding" that the trial court's summary judgment could be affirmed on the ground advanced by the concurring opinion; specifically, that Mr. Dolenz is a limited purpose public figure and neither Ms. Whitley nor Southwest Media acted with malice. (App 10 at n.1; *see also* concurring opinion at App. 12-16) The concurrence's citation of federal case law does not in and of itself make Mr. Dolenz's case into one over

which this Court has jurisdiction. And, more significantly, the court explicitly characterizes its adoption of the concurring opinion's reasoning as an "alternative" holding. (App. at 10 n.1)

Because the majority's reference to federal law is confined to an independent, alternative holding (indeed, federal law was not even discussed in the majority opinion), the "alternative holding" does not transform this case into one over which this Court has jurisdiction to grant a writ of certiorari. *See California v. Freeman*, 488 U.S. 1311, 1313-15 (1979) (noting that if this Court corrected a state court's view of federal laws in an "independent, alternative holding" and same result would be reached on remand by application of state laws, then this Court's review would amount to "nothing more than an advisory opinion.")

The Dallas court's opinion in this case "indicates clearly and expressly" (App. at 10 n.1) that the federal and state grounds are alternative holdings, and the state ground is adequate to support the judgment. *See Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). As a result, this Court lacks jurisdiction.

3. Mr. Dolenz's jurisdictional defects are incurable.

Although 28 U.S.C. § 1653 provides for amendment of defective allegations of jurisdiction in the trial or appellate courts, the jurisdictional defects in this case are incurable. Simply stated, the Dallas court of appeals is the highest Texas court to render judgment in this case, and that court's judgment is based on an independent analysis of Texas law.

III.

STATUTES AND RULES INVOLVED

Only one statute is involved in this case. That statute is section 73.002 of the Texas Civil Practice and Remedies Code, and section 73.002 provides, in relevant part:

> (a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.
>
> (b) This section applies to:
>
> (1) a fair, true and impartial account of:
>
> (A) a judicial proceeding. . . .

TEX. CIV. PRAC. & REM. CODE § 73.002(a) and (b).

IV.

STATEMENT OF THE CASE

The Article is about a series of lawsuits involving Petitioner and Dmitri Vail ("Vail"), a famous Dallas portrait artist. Petitioner first represented Vail in a lawsuit against NCNB Texas National Bank, in which Vail claimed that NCNB had breached its fiduciary duty as trustee of Vail's late wife's trust by failing to maintain Vail's property. The remainder of their courtroom encounters were adversarial. Petitioner next represented his own daughter, Brenda Dolenz Lievrouw ("Lievrouw"), in a lawsuit in small claims court against Vail. Petitioner had obtained several promissory notes from Vail, collateralized by Vail's paintings and their copyrights. When Vail and Petitioner had a falling out, Petitioner assigned those notes to his daughter and, in the small claims

lawsuit, Lievrouw sought to be reimbursed for the moving van she had hired to remove Vail's paintings from his home and for release of the paintings to her.

Then, Lievrouw sued Vail in Dallas County District Court, seeking to collect the notes and recover Vail's paintings. As part of that lawsuit, Vail sued Petitioner, claiming, *inter alia*, that Petitioner had conspired with his daughter to deprive him of his paintings and had breached his fiduciary duty to Vail. First Vail and then, after his death, his estate claimed that Petitioner had defrauded Vail, had breached his fiduciary duty to Vail, was negligent, and had violated the Texas Deceptive Trade Practices Act by coercing Vail to sign a contingency fee agreement with Petitioner, a power of attorney in Petitioner's favor, and promissory notes payable to Petitioner.[2] Vail also sent a file to the Office of the General Counsel of the State Bar of Texas, complaining that Petitioner had committed legal malpractice. Based on that complaint, the State Bar of Texas filed a disciplinary petition against Petitioner. Petitioner was also involved in the probate proceeding of Vail's estate, where similar claims of breach of fiduciary duty, negligence, and violation of the Texas Deceptive Trade Practices Act were alleged against Petitioner. The summary judgment record meticulously matches the complained-of statements in the Article with court records, most of which were read by the author prior to publication of the Article.

In the Article, Petitioner is referred to as a "spectacularly prolific litigant." In fact, he has been a party to a large number of lawsuits: he has filed approximately 75

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[2] In that lawsuit, all of these allegations made by Vail against Petitioner were adjudged by the Court as true as a result of a Motion for Sanctions filed by Vail.

lawsuits in Tarrant County and approximately 40 lawsuits in Dallas County, in which he represented himself more often than not. In at least nine of these lawsuits, Petitioner sued for libel and slander, making claims against individuals and, in one instance a hospital that had terminated his staff privileges.

Petitioner voluntarily brought his relationship with Vail into the public arena by enthusiastically cooperating with a writer from *D Magazine* for a story about the lawsuit between Vail and NCNB. When Ms. Whitley began writing the Article about Petitioner and Vail, she reviewed the court records discussed above and others, deposition transcripts, and exhibits. She also interviewed over 30 persons, including Petitioner, with knowledge of various statements in the Article. She reported in the Article the allegations of Brenda Lievrouw and Petitioner, as well as those of Vail and his estate.

V.

REASONS FOR DENYING THE WRIT

A. The Article is a fair, true and impartial account of judicial or official proceedings.

1. The Article is privileged under Texas statutes.

a. The Article is a privileged account of judicial proceedings.

A fair, true and impartial account of judicial proceedings or official proceedings authorized by law is privileged and cannot be the basis of a libel action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(1)(A) (Vernon 1990). So long as a pleading is open to public inspection, a magazine can truthfully publish, without malice, any allegation contained in the pleading without fear of liability. *Langston v. Eagle Pub. Co.*, 719 S.W.2d 612, 624 (Tex.

App. – Waco 1986, writ ref'd n.r.e.). The protection granted extends not only to pleadings and testimony in judicial proceedings, but also to statements concerning those pleadings. *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 636 (Tex. App. – Corpus Christi 1991, writ denied). The application of privilege under this statute is a question of law for the court. *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 97, 228 S.W.2d 499, 505 (1950).

Petitioner argues that the court of appeals failed to apply the proper standard for determining when the question of privilege under section 73.002 is a question of law. Petitioner is incorrect. The question of privilege is one of law "when the language used is unambiguous *or* when the facts and circumstances surrounding the defamation are undisputed." *Christy v. Stauffer Publications, Inc.*, 437 S.W.2d 814, 815 (Tex. 1969); *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 97, 228 S.W.2d 499, 505 (1950); *Walker v. Globe-News Pub. Co.*, 395 S.W.2d 686, 688 (Tex. Civ. App. – Amarillo 1965, writ ref'd n.r.e.); *Root v. Republic National Bank*, 337 S.W.2d 709, 711-12 (Tex. Civ. App. – Dallas 1960, no writ) (emphasis added). That is precisely the standard applied by the court of appeals in this case. (App. at 10)

b. The Article is substantially true.

Under Texas law, the truth of a statement alleged to be libelous is a complete defense to the action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (Vernon 1990). Falsity is an element of a plaintiff's case; therefore, Petitioner had the burden of proving falsity. *Jackson's Industrial Supplies, Inc. v. Cochran*, 809 S.W.2d 802 (Tex. App. – Beaumont 1991, no writ); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.).

The "substantial truth" of a statement is all that is required to constitute a complete defense; the statement need not be literally or mathematically true. *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990); *Gulf Construction Co. v. Mott*, 442 S.W.2d 778 (Tex. Civ. App. – Houston [14th Dist.] 1969, no writ). To determine whether a statement is substantially true, the court looks to the "gist" of a publication and decides whether the allegedly defamatory statement is more damaging to plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been. *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ); *see also Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 636 (Tex. App. – Corpus Christi 1991, writ denied) ("It is not the function of the court to serve as senior editor to determine if the reporting is absolutely, literally true; substantial truth is sufficient.")

The question of substantial truth is one of law for the court where the underlying facts as to the gist of the defamatory charge are undisputed. The court can then disregard any variance with respect to items of secondary importance and determine the truth as a matter of law. *McIlvain*, 794 S.W.2d at 16; *see also Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467 (Tex. App. – Dallas 1994, writ denied).

The Article is primarily an account of Petitioner's litigation involving Dmitri Vail, but also recounts other judicial proceedings that involved Petitioner. The writer has recounted the reports of lawyers, litigants, witnesses and observers, including Petitioner, who were connected with one or more of the multiple lawsuits. While Petitioner complains of statements in the Article that he characterizes as "defamatory," he makes no reference to

numerous statements therein that report favorably on his position.

In *Brady v. Cox Enterprises, Inc.*, 782 S.W.2d 272 (Tex. App. – Austin 1989, writ denied), the Austin court of appeals affirmed a summary judgment for libel defendants, holding that an article about a judge was privileged as a fair, true and impartial account of an official proceeding. The article republished complaints filed with the State Commission on Judicial Conduct and charges made in a filed mechanics' lien affidavit. The article also published the judge's denial of the claims. As a result, the court found that the newspaper had accurately reported the facts of the dispute. *Brady*, 782 S.W.2d at 275.

An article does not have to recount every allegation or every defense to be fair, true and impartial. No Texas case requires that a publication list all allegations or defenses or even an equivalent number for each party. Courts considering this privilege consider whether the account of the proceedings is substantially true; that is, did the article convey the gist of the proceedings? *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ); *Walker v. Globe-News Pub. Co.*, 395 S.W.2d 686 (Tex. Civ. App. – Amarillo 1965, writ ref'd n.r.e.).

In *Walker*, the Amarillo court of appeals affirmed a publisher's summary judgment after finding that the articles in question contained a privileged account of pleadings, affidavits and depositions. The articles described the arrest of plaintiff Walker and his co-defendant, Hunter. Walker argued that the articles were not fair, true and impartial under the Texas statute because they implied that at least $25,000.00 in stolen merchandise was recovered from both Walker and Hunter when, in fact, most of the stolen property was recovered from Hunter, not Walker.

The court of appeals compared the articles with instruments on file to conclude that the trial court was correct in holding that the statements were substantially true. *Walker*, 395 S.W.2d at 689. The court held that the fact that the articles omitted testimony that most of the property was recovered from Hunter was not such a departure from the undisputed facts as to render the articles untrue or unfair. *Id.* at 689-690. If the law were otherwise, a magazine would never be able to publish an article about *Lievrouw v. Vail v. Dolenz*, as the litigation involved multiple parties, claims, cross-claims, attorneys, and over 150 pleadings in all.

Petitioner argues that three statements in the Article are not substantially true and, therefore, these statements are not an accurate account of the judicial proceedings. However, the evidence on which he relies is not part of the record in this case. The trial court sustained Respondents' objections to Petitioner's affidavit, the evidence on which Petitioner relies. (App. at 29) Petitioner did not complain on appeal of the trial court's sustaining Respondents' objections; thus, the evidence upon which Petitioner relies is not before the Court and should not be considered.

It is clear from the record that the gist or sting of each of these three statements is substantially true. First, the statement in the Article that "he began to threaten" a head nurse is based on a court pleading that states "it has been expressed that [Petitioner] displayed a manner which is abusive and threatening" to a head nurse. The gist or sting of the two statements is the same as a matter of law.

Second, the statement in the Article that Dmitri Vail was fined for filing an affidavit that was not properly notarized is substantially true. As is apparent from the

pleadings attached as summary judgment evidence, Vail was accused of not having his affidavit properly notarized and that was the basis for the court's ruling in that case. Therefore, as a matter of law, this statement is substantially true and falls within the privilege set forth in section 73.002 of the Texas Civil Practice and Remedies Code.

Finally, the statement that Ms. Virginia Brinkmann appeared *pro se* is also an accurate account of a judicial proceeding. Exhibit 23 to Defendants' Amended Motion for Summary Judgment shows that Ms. Brinkmann filed an answer *pro se*.[3]

The Article's account, as a whole, and the specific statements complained of, are substantially true. Many of the statements recount testimony or admissions from Petitioner himself. These accounts and allegations against Petitioner are accurately described. Neither Southwest Media nor Glenna Whitley were required to conduct an independent investigation to determine if the underlying allegations were true or false. *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990).

Not only did the Article accurately report the allegations against Petitioner, but many of the allegations were judicially determined to be true. For example, in *Lievrouw v. Vail v. Dolenz*, a sanctions motion against Petitioner was granted, his pleadings were stricken, and the facts contained in the operative pleading against him were deemed true. Thus, in the probate action *In re Estate of Dmitri Vail, Deceased*, the court noted that it had been

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[3] Additionally, neither of these last two statements is "of and concerning" Petitioner. As such, neither is defamatory of Petitioner as a matter of law. *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890 (Tex. 1960).

deemed "conclusively established" that Petitioner had "solicited" Vail to retain Petitioner as his attorney of record at a time when Vail was "unable to make sound business judgments"; that Petitioner had "coerced" Vail into signing a contingency fee agreement, a power of attorney and several promissory notes; that Petitioner was "grossly negligent, fraudulent and acted with intentional, willful and heedless disregard for the rights of Vail." Petitioner may not agree with these findings, but the Article does accurately report them.

c. The Article is a fair comment on a matter of public concern.

Whether or not contained in court proceedings, a "reasonable and fair comment on or criticism of a matter of public concern, published for general information" is also privileged and cannot be the basis of any libel action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(2) (Vernon 1990).

Even those matters not directly contained in the various lawsuits, including *Lievrouw v. Vail v. Dolenz*, were matters of public concern, both in a legal and a literal sense. This Court has held that judicial proceedings associated with criminal matters are, without question, matters of legitimate public concern. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). The Corpus Christi court of appeals held in *Wavell* that articles about various judicial proceedings, one criminal and two civil, were newsworthy as a matter of law. *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 636 (Tex. App. – Corpus Christi 1991, writ denied).

Petitioner argues that his relationship with Dmitri Vail is not a "matter of public concern published for general information" because no crime was involved in

any of the lawsuits in the Article. However, crimes, prosecutions, and judicial proceedings related thereto are not the *only* matters of public concern. For example, a lawsuit between two residents and exclusive town in the Dallas area, Highland Park, was found to be of public concern. *Newton v. Dallas Morning News*, 376 S.W.2d 396, 400 (Tex. Civ. App. – Dallas 1964, no writ). A radio broadcast of an editorial critiquing a movie was also found to be a matter of public concern. *Traweek v. Radio Brady, Inc.*, 441 S.W.2d 240, 243 (Tex. Civ. App. – Austin 1969, writ ref'd n.r.e.). Finally, a comment on the performance of a coach was a matter of public concern. *Conkwright v. Globe News Pub. Co.*, 398 S.W.2d 385, 386 (Tex. Civ. App. – Eastland 1965, no writ).

In *Hill v. Herald-Post Pub. Co.*, 877 S.W.2d 774 (Tex. App. – El Paso 1994), *aff'd in part and rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994), the court of appeals stated:

> Just the fact that the allegations had been made in a judicial proceeding would, under *Cox Broadcasting*, make it a matter of continuing public concern and interest. Like it or not, once allegations have been made in a judicial proceeding against a private person, he becomes much the same as a public figure such as an office holder, with the result that a newspaper can continue to republish those allegations so long as the account is fair, true and impartial.

877 S.W.2d at 780 & n.8.

In this case, Petitioner was not a private person but had become a limited purpose public figure. Therefore, the allegations made against him in various judicial proceedings were matters of public concern.

Additionally, the Article is a fair comment. Petitioner is quoted extensively throughout the Article. Even the

case cited by Petitioner in support of his argument holds that the common law privilege of fair comment applies if the disclosed facts are true or privileged. Petition at 16 (citing *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 66 (2d Cir. 1980)). As is shown above, almost all of the statements Petitioner complained of are privileged. The remainder are not defamatory, are substantially true, or are opinions, and none were made with actual malice.

> To permit comment or criticism of a proceeding or act is necessarily to allow reasonable and fair latitude in such matter. It necessarily carries with it permission to draw from the facts any reasonable and fair inference or conclusion.
>
> * * *
>
> [T]he right of newspapers to make reasonable and fair comment and criticism upon matters of public concern for general information is at all times to be protected and never denied. Such comment or criticism, even when thoroughly justified, may of course be unpleasant to those involved. In this case, no doubt the publication, however justifiable, chafed and embarrassed defendant in error, but, if his conduct in such respect justified such comment or criticism, he has no just complaint.

Express Pub. Co. v. Keeran, 284 S.W. 913, 917 (Tex. Comm'n App. 1926). Here, the allegations that a physician and attorney took advantage of an aged, famous person as his patient and client likewise constitute newsworthy events of public concern.

2. Under the United States and Texas Constitutions, the press may publish the contents of court records without liability.

An accurate account of pleadings or proceedings in judicial actions is protected by the First and Fourteenth Amendments to the United States Constitution and by the Texas Constitution. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633 (Tex. App. – Corpus Christi 1991, writ denied); *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ).

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. *Cox Broadcasting Corp. v. Cohn*, 95 S. Ct. 1029, 1047 (1975). To hold otherwise would . . . result in the suppression of news that should be available to the public. *Id.* at 1046.

Langston, 797 S.W.2d at 70.

The Article was developed from substantial amounts of information contained in court records. The First and Fourteenth Amendments and the Texas Constitution protect the publication of such information.

In *Wavell*, the court upheld summary judgment in favor of a newspaper that published a series of articles describing the charges and claims in various civil suits and criminal proceedings between Wavell (a lawyer) and his former lover. Wavell claimed that the newspaper's motive for publishing the articles was a libel action he had previously filed against the paper on behalf of a client. The court held:

> In its Motion for Summary Judgment, the defendant-appellees argued that the United States and Texas Constitutions prohibit civil damages

> against a newspaper for accurate and substantially true accounts of newsworthy matters arising from and pertaining to judicial proceedings. We agree.
>
> * * *
>
> The First Amendment protects the reporting of private facts where revealed in connection with newsworthy matters.

Wavell, 809 S.W.2d at 635, 636.

Petitioner cannot successfully argue that the charges made against him in these other court proceedings are false and that this creates a fact issue. Such is not Respondents' burden. The republication of those charges contained in court records is privileged. The truth of the underlying charges is not an issue. If it were, then the press would not enjoy the protection of the law while reporting on lawsuits, criminal charges, congressional hearings and all other matters which are vitally important to the freedom of speech and the free flow of information in this society. The court in *Wavell* specifically addressed this issue:

> The evidence, in the form of depositions, pleadings, trial transcripts and other documents associated with Covington's various judicial proceedings, shows that the articles published by *Caller-Times* are substantially true accounts of the judicial proceedings they concern. The article's reference to Wavell and the reporting of various facts surrounding Wavell's status as a victim of crime are newsworthy and of legitimate public interest. The articles identify to the reader that they are accounts of judicial proceedings and do not portray the statements reported as facts; rather the articles merely relate witness testimony and allegations of the parties.

> We hold that because the published articles are substantially true accounts of newsworthy events arising from open judicial proceedings, the First Amendment provides the *Caller-Times* immunity from liability for damages resulting from its publication of the articles.

Wavell, 809 S.W.2d at 636.

It is not even necessary that the journalist obtained the information directly from the court file or pleadings in order for it to be protected. In *Langston v. Eagle Printing Co.*, 797 S.W.2d 66 (Tex. App. – Waco 1990, no writ), the articles in question reported on a civil suit filed against the libel plaintiff by the Texas Attorney General. The author quoted an Assistant Attorney General, who had spoken with the reporter in an out-of-court statement, which that source then denied making. Noting that the statement was a substantially true account of the gist of the claims in the court action, the Court nevertheless granted summary judgment.

> The articles were substantially true accounts of pleadings available to the public. Accordingly, the First Amendment precludes attaching any liability to their publication and the Court correctly entered summary judgment on that ground.

Langston, 797 S.W.2d at 70.

In this case, the accusations in the Article – that Petitioner took advantage of an elderly client and abused his position as an attorney and a trustee – are taken straight out of several lawsuits which accuse him of that and more.

B. Petitioner is a limited purpose public figure, and neither Southwest Media nor Ms. Whitley acted with malice.

1. Petitioner is a public figure for the subject matter of the Article.

As an alternative basis for upholding the trial court's summary judgment, the court of appeals correctly held that Petitioner is a public figure for the purpose of the subject matter of the Article. The court of appeals' alternative holding is based upon controlling case authorities and Respondents offered competent summary judgment evidence that Petitioner thrust himself into the controversy concerning his relationship with Dmitri Vail. The subject matter of the article was indeed that very relationship and the controversy that arose from it. Petitioner invites a much too narrow interpretation of the limited public figure concept.

The most important factor in determining whether a person is a public figure is whether he has sought publicity on the topic being discussed. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845, 849-51 (Tex. App. – Amarillo 1982, writ dism'd w.o.j.). Petitioner had previously sought publicity and thrust himself and Dmitri Vail to the forefront of Vail's controversy with NCNB Texas, in an attempt to influence the outcome of that dispute. Specifically, Petitioner sought publicity regarding his representation of Dmitri Vail when he encouraged publication in *D Magazine* of an article written by Gary McDonald and published in March 1990.

> Those who, by reason of . . . the vigor and success with which they seek the public's attention, are properly classed as public figures . . . , may recover for injury to reputation only on

> clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for its truth.

Gertz, 418 U.S. at 342.

Petitioner cannot seek favorable publicity regarding the Vail lawsuit and his role therein and then disclaim his public figure status when the publicity turns adverse. Most public figures are such only for certain issues, such as here, the relationship between Petitioner and Dmitri Vail.

In *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.), the plaintiff became a "vortex public figure," as a member of a private development board for a state university by reason of his actions in voluntarily becoming involved in a controversy concerning the reasons for the resignation of a fellow board member and the termination of several university employees.

Litigation may trigger public figure status. Where a woman arrested for shoplifting filed suit against a department store, alleging racial discrimination, her subsequent libel suit against a broadcaster for falsely reporting an alleged prior arrest was decided against her on summary judgment. The plaintiff was held to be a public figure for this limited purpose. *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118 (Colo. Ct. App. 1992); *see Maxwell v. Henry*, 815 F. Supp. 213, 215 (S.D. Tex. 1993) (plaintiff, arrested during a protest near an abortion clinic, was a limited purpose public figure for the purpose of a broadcast concerning public controversies and protests pertaining to abortion rights demonstrations on the eve of the Republican National Convention and the related investigations and proceedings to enforce the law).

The two cases cited by Petitioner in support of his claim that he is not a limited purpose public figure are distinguishable. *See* Petition at 6-7. In *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977), Foster was the elected county surveyor and had been hired by the County to perform specific projects. *Id.* at 810. The article involved a project that Foster had been hired, not elected, to perform. *Id.* at 813. Foster did not have any direct dealings with the public nor did he have any personal interest in the resolution of the problem that was the subject of the article. *Id.* at 814, 817. "Foster did not attempt to influence the outcome of the controversy through exposure of his personal opinions in the media." *Id.* at 817.

This is exactly what Petitioner did by giving his opinions to Gary McDonald. By placing himself into the middle of a controversy involving his representation of Dmitri Vail, Petitioner became a limited purpose public figure.

The other case cited by Petitioner is *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845 (Tex. App. – Amarillo 1982, writ dism'd w.o.j.). In *Durham*, an attorney sued a television broadcasting station, claiming he was defamed by a statement that he was connected with the infamous Chicken Ranch. *Id.* at 847. The court found that, although the attorney had achieved notoriety about matters he had handled as an attorney, he did not thrust himself to the forefront of the controversy involving the Chicken Ranch. *Id.* at 850-51.

As stated above, Petitioner did thrust himself and Dmitri Vail to the forefront of the very issue of the Article by "enthusiastically cooperating" with the author of a story about Dmitri Vail. In *Durham*, the court found that

the attorney might well be a limited purpose public figure for his activities as special counsel investigating the way county funds were being managed. *Id.* at 850, 851. In reaching this conclusion, the court discussed the fact that the attorney had talked with the press and answered questions about the investigation, just as Petitioner gave interviews to the author of the first article.

Petitioner claims that he is not a limited purpose public figure for the other lawsuits involving him and Dmitri Vail. However, Petitioner's definition of "topic" is too narrow. For example, in *Wavell v. Caller-Times Pub. Co.*, all of the judicial proceedings resulting from or connected with the assault of Wavell by his former lover were newsworthy. The articles recounted testimony and evidence concerning Wavell's former relationship with his lover, his lover's allegations of paternity against him, and Wavell's filing of a civil lawsuit against his former lover. *Wavell*, 809 S.W.2d at 635. Similarly, in *Maxwell*, because the plaintiff had participated in a protest of an abortion clinic, the court found that he had "thrust himself" to the forefront of that controversy. *Maxwell*, 815 F. Supp. at 215. The same is true in this case. Petitioner thrust both himself and Dmitri Vail into the limelight. Once that relationship was publicized by Petitioner, as in *Wavell*, he became a public figure for purposes of that relationship, as well as for other matters concerning that relationship. Petitioner was a limited purpose public figure with regard to his entire relationship with Dmitri Vail, not just for the NCNB lawsuit in which he represented Vail.

2. Respondents negated actual malice as a matter of law.

As to statements in the Article that are the subject of a qualified privilege, Petitioner must have established that such statements were untrue and were published with actual malice in order to sustain his claim for libel. "Actual malice" is defined as publishing a statement when the speaker knew it was false or with reckless disregard for its falsity. *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "Reckless disregard" of falsity means publishing a statement when the speaker had a "high degree of awareness of probable falseness" and, in fact, entertained serious doubts as to the truth of the publication. *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989), quoting *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Thus, "actual malice" is more than negligence; it is a subjective standard, based on the speaker's state of mind.

The Texas Supreme Court has held that summary judgment is appropriate where a libel defendant denies actual malice and the plaintiff fails to present competent evidence of actual malice. *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989); *see also Hill v. Herald-Post Pub. Co.*, 877 S.W.2d 774 (Tex. App. – El Paso 1994), *aff'd in part and rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994).[4]

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[4] Petitioner's characterization of the holding in *Casso v. Brand* is erroneous. In *Casso*, the Court held that federal case law applying federal procedural law does not require Texas courts in libel cases to disregard Texas summary judgment procedure. *Casso*, 776 S.W.2d at 556. The Court then affirmed a summary judgment pursuant to Texas procedural law for a defendant based on plaintiff's failure to establish actual malice. *Id.* at 559.

In *Hill*, the appellate court affirmed the trial court's summary judgment in favor of the defendants. The deposition of the author in *Hill* indicated that he tried to be as fair, accurate, and objective as possible in writing the articles at issue. *Hill*, 877 S.W.2d at 780-81. The assertions to the contrary made by plaintiff in his affidavit were "pure opinion" and would not overcome the deposition testimony of the author. *Id.*

This Article reported the allegations against Petitioner as they were made by the Vails and others. Ms. Whitley's affidavit states that she had no reason to doubt the truth of the statements in the Article, which statements recount the various charges and counter-charges, defenses and denials by Petitioner, as well as the results of other judicial proceedings. The affidavit of the Executive Editor of *D Magazine* also establishes that he had no reason to doubt the factual accuracy of the story.

To show actual malice, Petitioner must present admissible evidence that Respondents knew that the descriptions of the allegations were false or probably false. Actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968).

> It is not enough for the jury to disbelieve defendant's testimony. Rather, the plaintiff must offer clear and convincing affirmative proof to support a recovery. While it is conceivable that a defendant's trial testimony, under the rigors of cross-examination, could provide that requisite proof, it is more likely that plaintiff will have to secure that evidence elsewhere. If he cannot secure it during the discovery process, he is unlikely to stumble onto it at trial.

Casso, 776 S.W.2d at 558-59. The mere fact that Petitioner disputes some of those underlying allegations does not show malice on the part of Respondents. The content of the Article itself cannot be evidence of actual malice. *Gillum v. Republic Health Corp.*, 778 S.W.2d 558, 572-73 (Tex. App. – Dallas 1989, no writ) ("[M]alice cannot be inferred from the character of the allegedly defamatory statement without other evidence to prove it.")

As Respondents' objections to Petitioner's summary judgment evidence were sustained, the evidence to which Petitioner refers is not properly before the Court. Further, the apparent earlier draft of the Article with what seems like editor's questions to the author show care in publication – not malice. The court of appeals properly held, in the alternative, that Respondents' summary judgment evidence negated actual malice as a matter of law.

C. Even if this Court did have jurisdiction to grant a writ of certiorari, that jurisdiction would extend only to Mr. Dolenz's arguments that were actually addressed by the court of appeals.

Jurisdiction under section 1257 of Title 28 applies only to "[f]inal judgments or decrees *rendered* by the highest court of a State. . . . " 28 U.S.C. § 1257(a) (emphasis added). Mr. Dolenz raises several arguments in his petition that the Dallas court of appeals did not reach because resolution of those issues was not necessary to final disposition of the appeal. TEX. R. APP. P. 90(a). (App. at 10) Specifically, in his questions 3, 4, 5 and 7, Mr. Dolenz asserts that "[t]he trial court erred" in certain of its rulings. *See* Petition at i-ii.

If the Texas Supreme Court had found error in the Dallas court of appeals' decision, it would have reversed the judgment and remanded this case to the court of

appeals for consideration of the issues not addressed by that court. *See Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995); *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994). See also TEX. R. APP. P. 100(a) (only matters "determined" by court of appeals are properly raised in motion for rehearing). Likewise, this Court's review by certiorari does not encompass questions that were not addressed by the highest court of a state. 28 U.S.C. § 1257. Nevertheless, in an abundance of caution, the following paragraphs contain responsive arguments to the issues that the Dallas court of appeals did not address.

1. Opinions in the Article are not actionable.

Expressions of opinion are protected under the First Amendment to the United States Constitution and under the Texas Constitution. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); TEX. CONST. art. 1, § 8; *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.). This protection is only logical, as falsity is an element of libel, and pure opinions cannot be proven true or false. Only where an opinion implies the existence of false and defamatory facts can the plaintiff sustain a libel action. *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914 (Tex. App. – Corpus Christi 1991, writ dism'd w.o.j.). While there is no absolute First Amendment protection for all opinion, this Court makes it clear that opinions that do not imply false facts are nevertheless protected. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990).

Petitioner has not pointed the Court to opinions in the Article that imply false and defamatory facts. To the extent that the author's opinions imply fraudulent or other improper conduct by Petitioner, the allegations of

such conduct are taken from court pleadings and are privileged (and were found by the court in *Lievrouw v. Vail v. Dolenz* to be true). The remainder of the opinions are hyperbole and are not meant to be taken literally. Such statements are not defamatory as a matter of law. *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App. – San Antonio 1988, writ denied), *cert. denied*, 493 U.S. 1021 (1990).

2. Certain statements in the Article are not defamatory as a matter of law.

Inherent within a libel action is the premise that the statement must be defamatory. A defamatory statement exposes a person to public hatred, contempt, ridicule, or financial injury, or impeaches his honesty, integrity, virtue or reputation. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1990). A defamatory statement is false, abusive, unpleasant and objectionable to an individual. *Rawlins v. McKee*, 327 S.W.2d 633 (Tex. Civ. App. – Texarkana 1959, writ ref'd n.r.e.). The opinions of the parties or of the actual recipient have no bearing on whether the complained-of words are actually defamatory. *Id.* at 58; *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex. Civ. App. – Dallas 1968, no writ). Rather, the statements must be defamatory in the mind of a reader of ordinary intelligence who has read the statement in light of the surrounding circumstances. *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). Only when the court determines the language to be ambiguous or of doubtful import should a jury be permitted to determine the statement's meaning and the effect of the statement on an ordinary reader. *Id.*

Petitioner argues that the Article, as a whole, is capable of defamatory meaning. However, Respondents

moved for summary judgment on the ground that certain of the statements were not defamatory as a matter of law. Petitioner's opinion of the statements and his objections to their content do not make the statements defamatory. The trial court considered the effect of the specific statements in light of the Article as a whole and the circumstances surrounding publication and found that the items could not be defamatory in the mind of a reader of ordinary intelligence as a matter of law.

3. The neutral reportage privilege protects the statements in the Article.

One of the bases for Respondents' summary judgment motion was that the neutral reportage privilege applies to the statements in the Article. This privilege protects "the accurate and dispassionate reporting of . . . charges, regardless of the reporter's private opinion regarding their validity." *Edwards v. National Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom., Edwards v. New York Times Co.*, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977). Because the Dallas court of appeals affirmed the trial court's summary judgment based on a Texas statute, it did not address whether the summary judgment was proper on the basis of the neutral reportage privilege. As a result, the Court need not consider Petitioner's contentions in this regard.

Charges made by a famous artist and others, including the State Bar of Texas, that an attorney took advantage of his attorney-client relationship are certainly serious charges. The reporting is neutral, as Petitioner is quoted extensively throughout the Article with his version of the story. Finally, the Article is an accurate account of the charges made by and against Petitioner. Therefore, the neutral reportage privilege provides an

additional basis supporting the summary judgment in Respondents' favor.

VI.

CONCLUSION

This Court lacks jurisdiction to grant a writ of certiorari because the Dallas court of appeals' judgment is based on an independent and adequate state ground. The court of appeals properly concluded that the trial court's summary judgment was supported under the theory that the Article as a whole was a "fair, true, and impartial account of judicial or official proceedings" and was privileged under state law. As an alternative holding, the court correctly concluded that Mr. Dolenz is a limited purpose public figure and neither Southwest Media nor Ms. Whitley acted with malice.

Respondents respectfully ask the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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